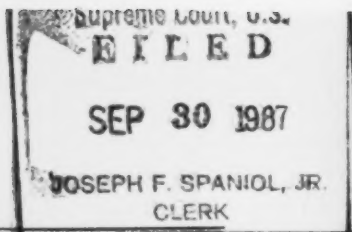


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NO. _____



**IN THE
SUPREME COURT
OF THE UNITED STATES**

October Term, 1987

**FRESNO POLICE OFFICERS ASSOCIATION, et al.,
Petitioner**

v.

STATE OF CALIFORNIA, et al., Respondents

**PETITION FOR A WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
FIRST APPELLATE DISTRICT, DIVISION FIVE**

**CHRISTOPHER D. BURDICK
PHILIP M. MILLER
CARROLL, BURDICK & McDONOUGH
One Ecker Building, Ste. 400
Ecker and Stevenson Streets
San Francisco, CA 94105**

**GEORGE W. SHAEFFER, JR.
SILVER, KREISLER, GOLDWASSER &
SHAEFFER
1201 Dove Street, Ste. 600
Newport Beach, CA 92660
(714) 955-1971**

Counsel for Petitioners

14 pps



Lorraine Mitchell - Legal Briefs

732 E. WASHINGTON BOULEVARD
LOS ANGELES, CALIFORNIA 90021
TELEPHONE (213) 747-5831

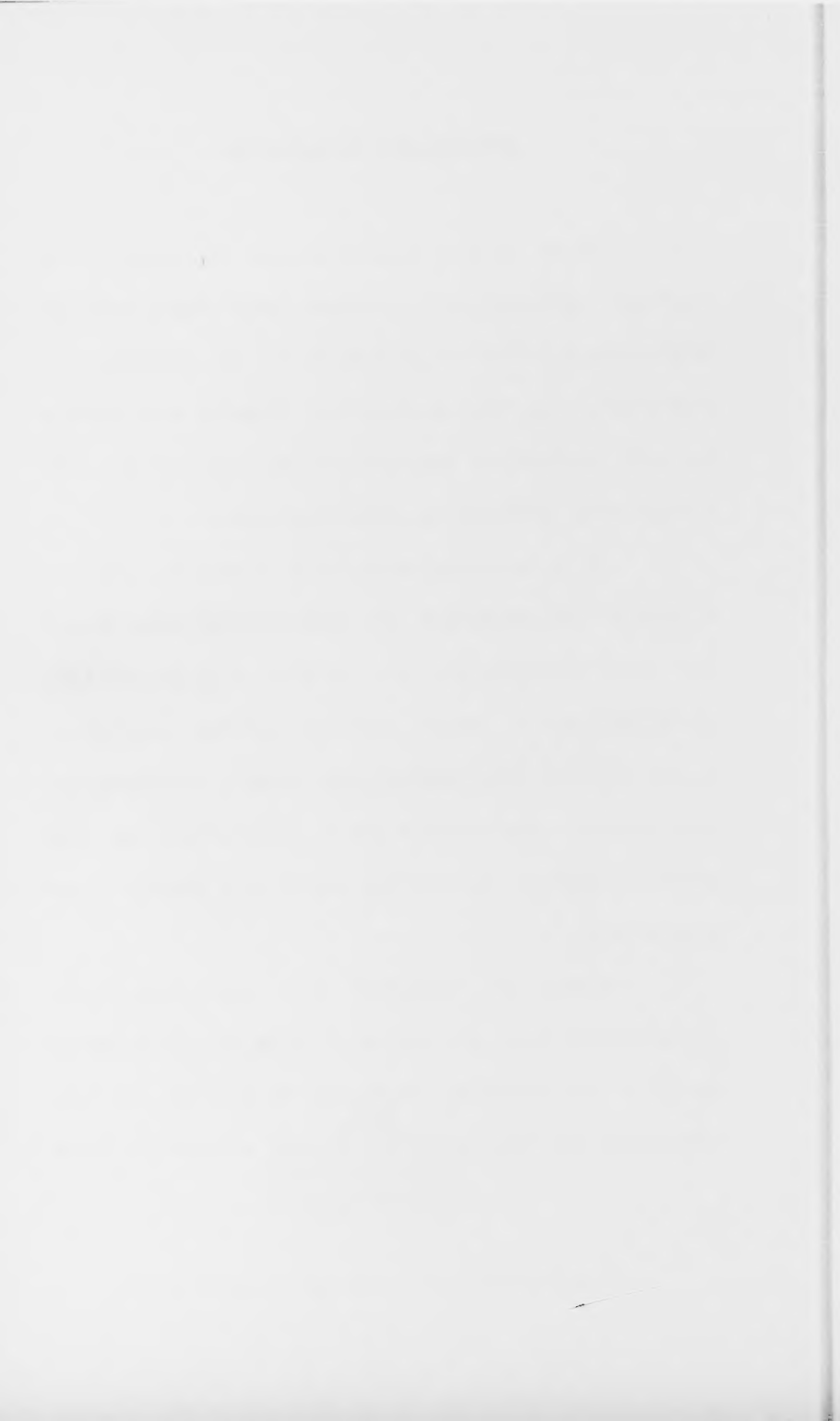
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QUESTIONS PRESENTED

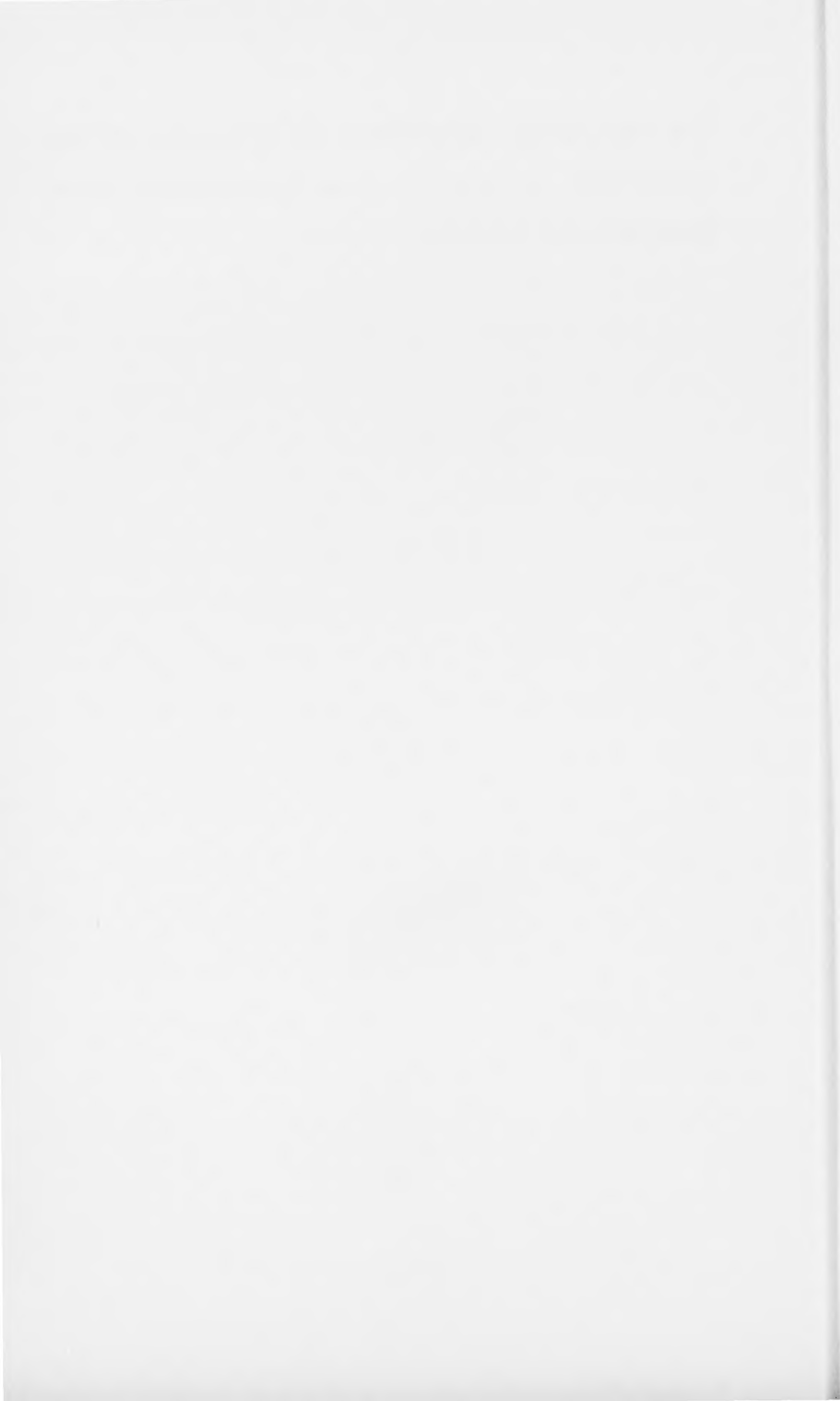
1. When State Legislation appropriates vested contractual rights, and deprives an employee of the very heart of an employment contract, is the exclusive remedy available to the affected employees an action to set aside the offending legislation.

2. Did a compensable taking occur within the meaning of the Fifth Amendment by the adoption of State Legislation prohibiting a local public agency employer from paying its employees their contracted for salary increases as a condition of the public agency receiving bail-out funds from the State.

3. Does an action for inverse condemnation lie to permit the petitioners herein to recover damages measured by the interest on the sums of money withheld from



the employees' paychecks as a result of the enactment of California Government Code §§16280 and 16280.5.



LIST OF PARTIES

The Petitioners before this Court are:

The Fresno Police Officers Association, the Oakland Police Officers Association, the Organization of Deputy Sheriffs of San Mateo County, Bill Betzold of the Fresno Police Officers Association, Robert Foster of the Oakland Police Officers Association, and Frank Kastell of the San Mateo County Deputy Sheriffs Association.

The Respondents before this Court are the State of California and the Controller for the State of California.

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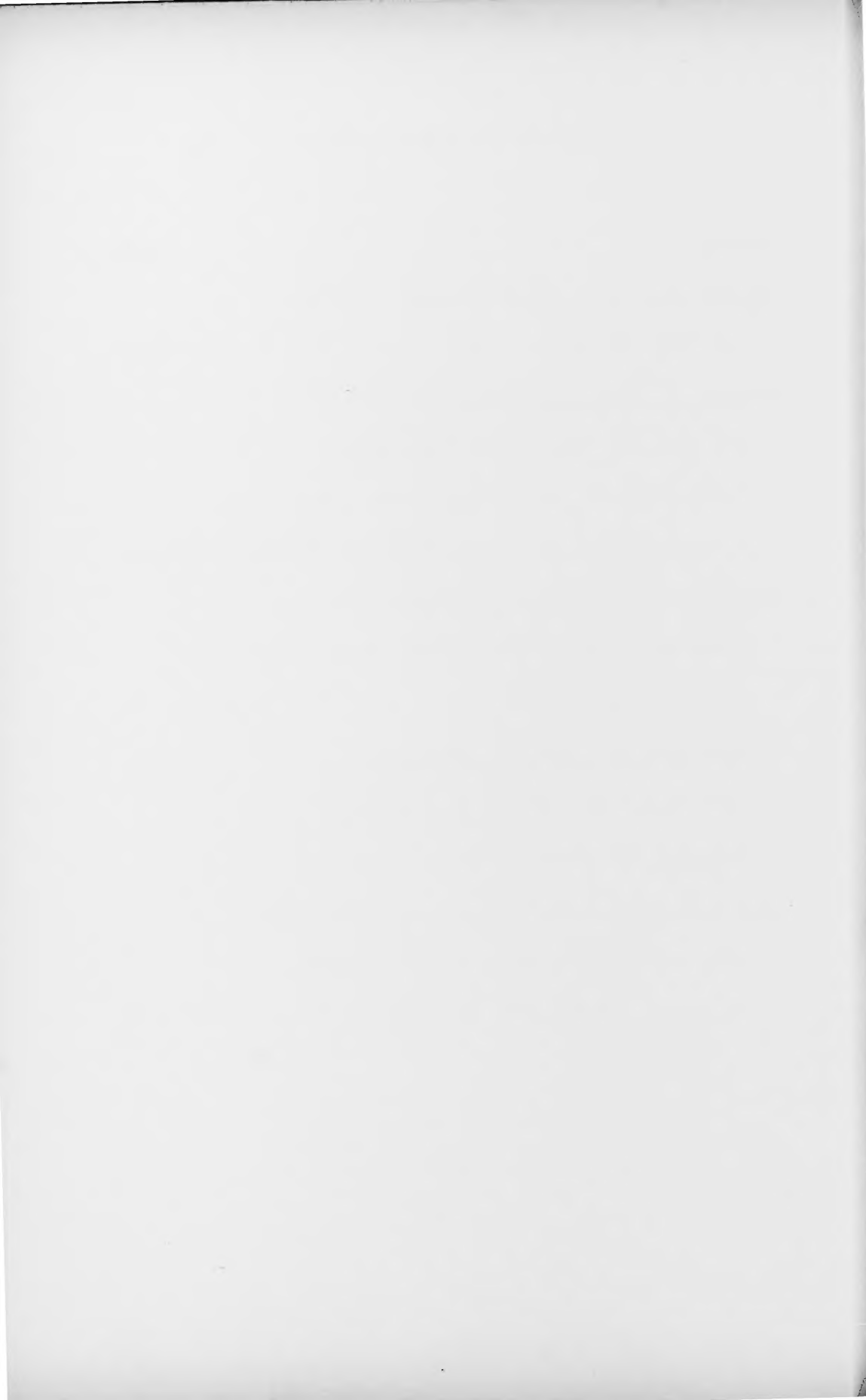


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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

FRESNO POLICE OFFICERS ASSOCIATION, et al.,
Petitioner

v.

STATE OF CALIFORNIA, et al., Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
FIRST APPELLATE DISTRICT, DIVISION FIVE

The Petitioners Fresno Police Officers Association, et al., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Court of Appeal of the State of California, First Appellate District, Division Five, entered in the above-entitled proceeding on March 19, 1987.



OPINIONS BELOW

The opinion of the California Court of Appeal in this matter is reported at 190 Cal.App.3d 413 and 235 Cal.Rptr. 474. The opinion is reprinted in the appendix hereto, p. 1a, infra. The order dated July 2, 1987 denying review of the judgment and opinion of the Court of Appeal by the California Supreme Court has not been reported. The order is reprinted in the appendix hereto, p. 14a.

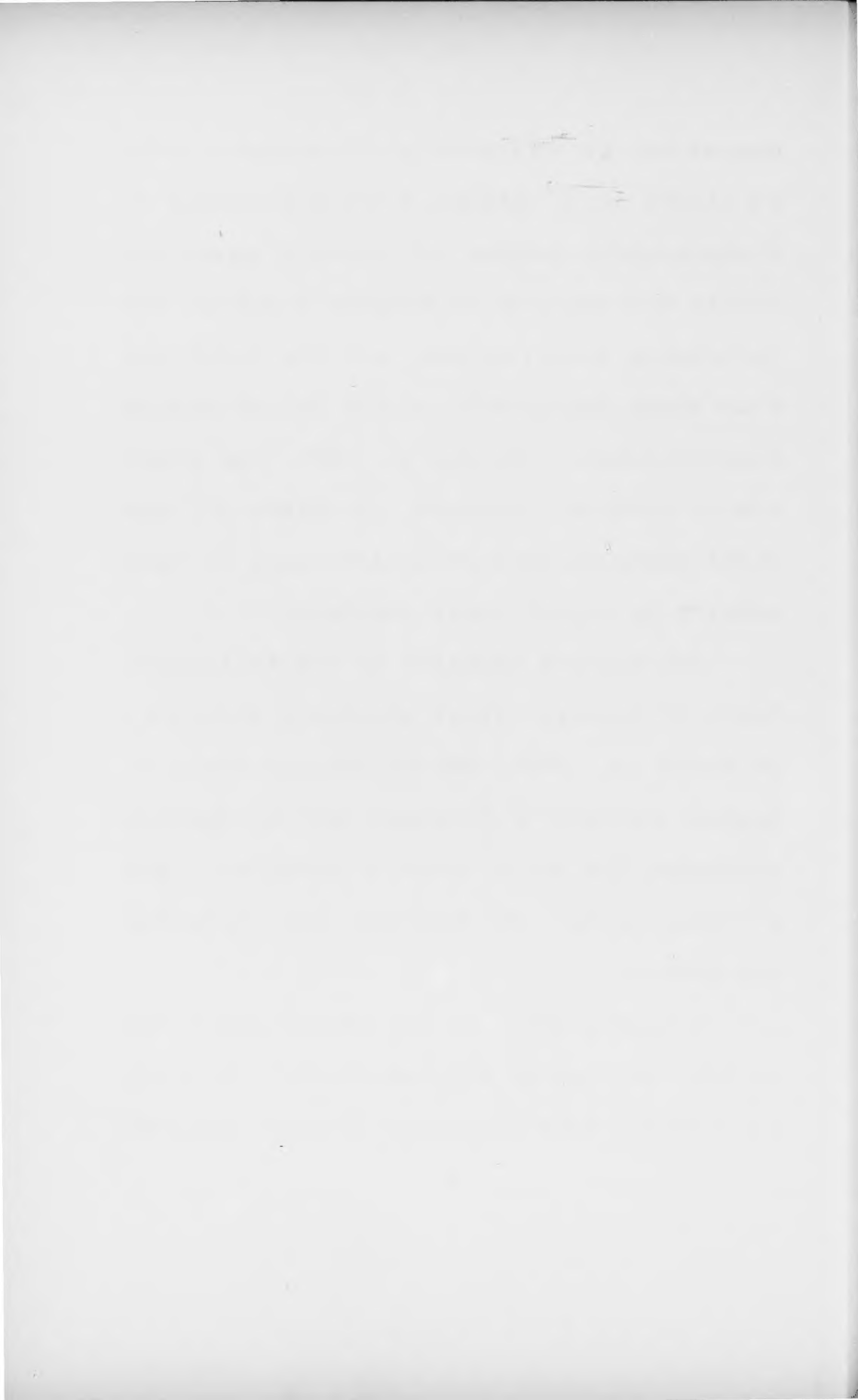
JURISDICTION

Petitioners filed actions for inverse condemnation and an accounting against the State of California and its Controller, of February 11, 1980 in the Superior Court in the State of California, in and for the City and County of San Francisco. Petitioners contended in their action that the

operation of California Government Code §§16280 and 16280.5 constituted a compensable taking of private property within the meaning of Article 1 §19 of the California Constitution, and the Fifth and Fourteenth Amendments to the United States Constitution. On May 2, 1985, the trial court entered judgment in favor of the State ordering that Plaintiffs were to take nothing by way of their complaint.

Petitioners appealed to the California Court of Appeals, First Appellate District. On March 19, 1987, the California Court of Appeal entered a judgment and an opinion affirming the trial court's decision. See p. 12a, *infra*. No Petition for rehearing was sought.

A timely petition for review was filed in the California Supreme Court. On July 2, 1987, the Supreme Court denied



Appellants Petition for Review. See p.14a, infra.

Petitioners have made no application for an extension of time to file a Petition for Writ of Certiorari.

The jurisdiction of this Court to review the judgment of the California Court of Appeal is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS AND

STATUTES INVOLVED

Fifth Amendment, United States Constitution:

[N]or shall private property be taken for public use, without just compensation.

Fourteenth Amendment, United States Constitution:

No State shall make or enforce any law that shall abridge the privileges or



immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

California Government Code §16280.

This section is reprinted in the appendix hereto, p. 15a, *infra*.

California Government Code §16280.5.

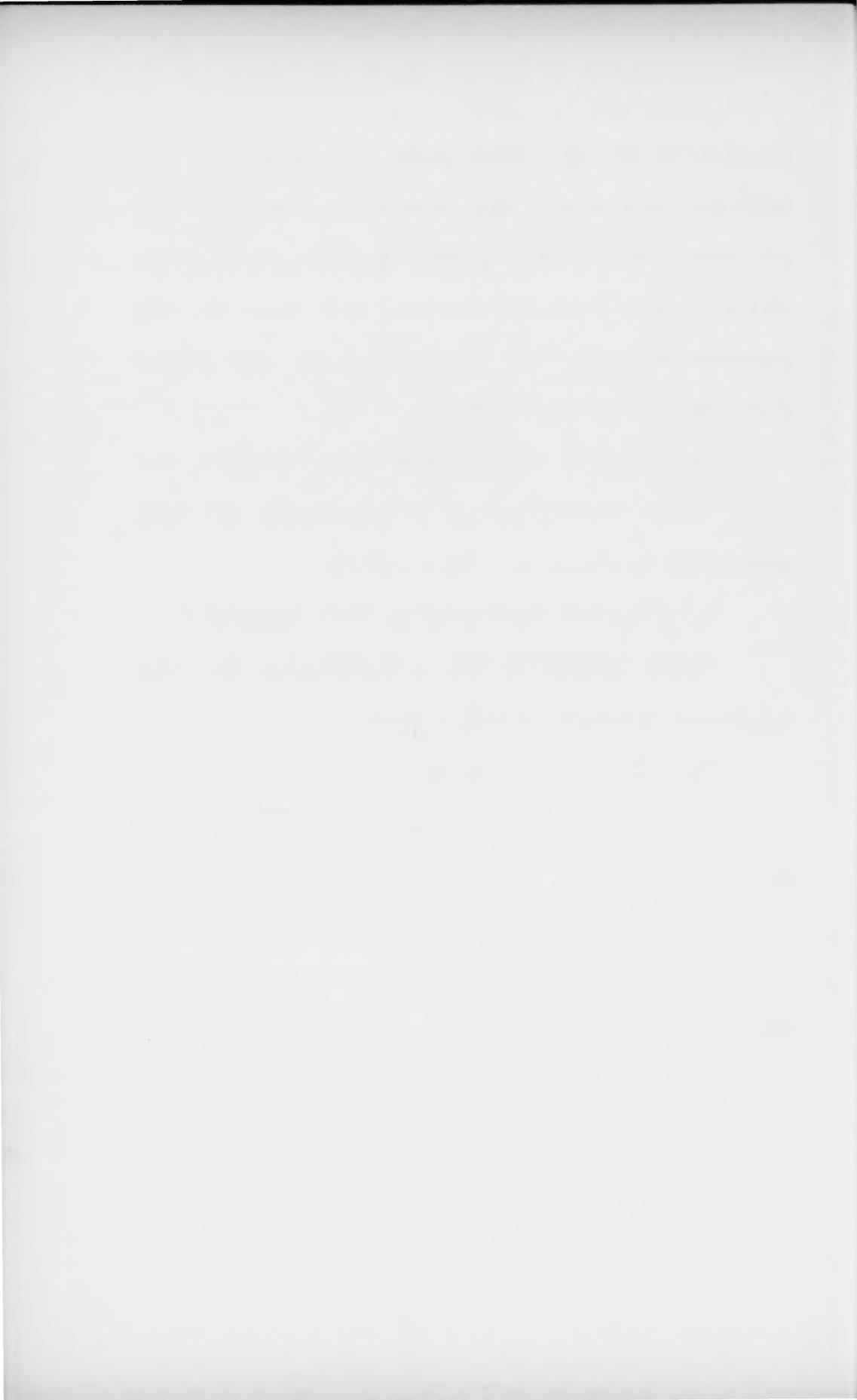
This section is reprinted in the appendix hereto, p.17a, *infra*.

California Government Code §16281.

This section is reprinted in the appendix hereto, p.18a, *infra*.

California Government Code §16282.

This section is reprinted in the appendix hereto, p. 19a, *infra*.



STATEMENT OF THE CASE

Petitioners filed actions for inverse condemnation and accounting against the State of California (hereinafter "State") and its Controller on February 11, 1980. Petitioners are either employees or organizations representing employees of local public agencies in California who were entitled by contract to cost of living salary increases for the fiscal year 1978-79. These salary increases were withheld by their local public agency employers after the enactment of California Government Code §§16280 and 16280.5. Petitioners have either not received interest or the full measure of interest on the amounts so withheld.

The California Supreme Court declared Government Code §§16280 and 16280.5 to be an unconstitutional abridgement of

contractual agreements by the State in Sonoma County Organization of Public Employees, et al., v. County of Sonoma, (1979) 23 Cal.3d 296. However, the Supreme Court held in Sonoma County that the local public agencies were not required to pay interest on the unpaid wages and salaries because such agencies were prevented by law from paying the employees. Id. at 321. Petitioners were not a party to the Sonoma County action. (App.36)¹. Therefore, an action in inverse condemnation was brought by Petitioners to compel the State and the State Controller to pay damages to the public employees adversely affected by Government Code §§16280 and 16280.5

¹ The above reference is to page 36 of APPELLANT'S APPENDIX IN LIEU OF CLERK'S TRANSCRIPT ON APPEAL. All subsequent references to the APPENDIX IN LIEU OF CLERK'S TRANSCRIPTS ON APPEAL will be made in the same manner.

measured by the unpaid interest on the sums withheld from their paychecks.

The action was based on the Fifth and Fourteenth Amendments to the United States Constitution and Article I, §19 of the California Constitution. Paragraph XXII of the Complaint provides generally that the adoption of California Government Code §§16280 and 16280.5 constituted a taking of private property within the meaning of the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, §19 of the California Constitution. (App.13)

Petitioners contended in the Courts below that they proved the three elements of a cause of action in inverse condemnation: (1) an interest in property, (2) a public use, and (3) property taken. Petitioners right to receive a cost of



living wage or salary increase for the fiscal year 1978-79, pursuant to a contract, agreement, or memorandum of understanding between a local public agency and an employee organization, constitutes a contractual right. Contractual rights are an interest in property which can be taken for public use by the State, provided just compensation is paid. The operation of Government Code §§16280 and 16280.5 rendered null and void cost of living wage or salary increases as provided for by contract. A specific public use was declared in Government code §16281 by the State Legislature to be as follows: "(1) to allow essential government services to be maintained at a higher level than would otherwise be the case in the absence of the legislation, (2) to promote full employment, and (3) to prevent layoffs."

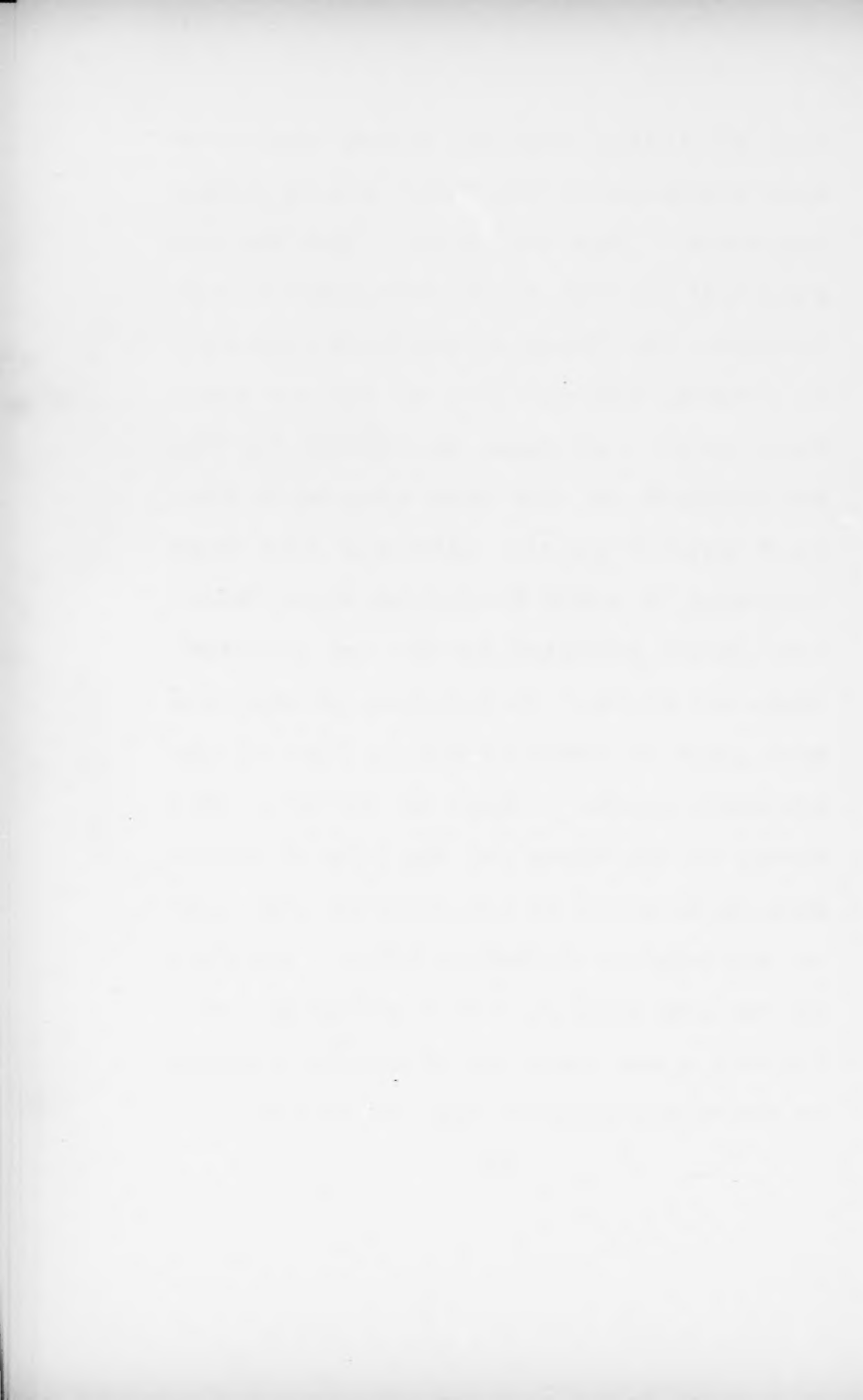


Petitioners contended in the Courts below that the operation of Government Code §§16280 and 16280.5 constituted a taking of private property within the meaning of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, §19 of the California Constitution. The enactment of these sections denied to Petitioners the use and enjoyment of funds withheld from their paychecks by local public agencies until such time as the statutes were declared unconstitutional in Sonoma County. The measure of the loss of use and enjoyment of the sums withheld is the interest on said sums at the legal state of interest.

The AGREED STATEMENT OF FACTS is found in the Appendix in lieu of clerk's transcript on Appeal at App. 34-38. The AGREED STATEMENT OF FACTS includes the

following stipulations. Government Code §§16280 and 16280.5 provided that State bail-out funds to assist local public agencies suffering from economic crisis resulting from the enactment of Proposition 13, Article 13-A of the California Constitution, would not be available to any local public agency which provided to its employees a greater per-centage salary increase than those provided to State employees during fiscal year 1978-79. (App. 39). The withheld wage and salary increases were paid to Petitioners by their respective local public agency employers after the California Supreme Court's decision in Sonoma County. (Id). No cost of living wage or salary increases to local public agency employees were withheld by the State as a result of the enactment of said Government Code Sections. (Id). The

cost of living wage or salary increases were withheld by the local public agency employers. (App. at 39-40). But for the passage of the said Government Code Sections, the County of San Mateo, the City of Fresno, and the City of Oakland would have paid the wage increases to the Petitioners at the time they were due. Said public agency withheld the wage increases to avoid forfeiting State "bail-out" funds pursuant to the two statutes. (App. at 40-42). No benefits of any kind were paid to Petitioners in lieu of the withheld wages. (App. at 41-42). The County of San Mateo and the City of Fresno paid no interest to the affected employees on any amounts withheld. (Id.). The City of Oakland paid to their affected Petitioners a sum equal to 7% simple interest on the sums withheld. (App. at 42-43).



The procedural history of this action is as follows. Petitioners originally filed their action as a Class Action. (App. 2-19) The State filed an Answer and Demurrer to the Complaint on July 21, 1980. (App. 20-28). On September 23, 1980, the State's Demurrer to the Complaint was overruled in its entirety. (App. 29).

The Petitioners' attempt to have the action certified as a Class Action on behalf of all public employees who were similarly situated with Petitioners was denied.²

The State filed a Motion for Summary Judgment or in the Alternative for Summary

² The Class certification issues were the subject of the consolidated Appeal by the Appellants involving the same parties, case number 1st Civil No. A0304012. The California Court of Appeal's Opinion did not address any issue other than the inverse condemnation issues raised by Appellants.



Adjudication of Issues on December 6, 1984. (App. 31-34). The Superior Court denied the State's Motion for Summary Judgment, and denied in part and granted in part the State's Summary Adjudication of Issues. (App. 35-36).

On February 4, 1985, the matter was tried by the Superior Court, the Hon. Stuart R. Pollak, presiding. The trial court considered the AGREED STATEMENT OF FACTS and the Opening and Reply Briefs of the parties. (App. 45-59).

On March 11, 1985, the trial court issued its Tentative Decision ruling that "[T]he enactment of Government Code §§16280 and 16280.5 did not constitute a taking or damaging of private property within the meaning of Article I, §19 of the California Constitution, or of the Fifth and Fourteenth Amendments of the United States



Constitution." The State was, therefore, entitled to judgment in its favor. (App. 45-46).

On May 2, 1985, the trial court issued its STATEMENT OF DECISION adopting its Tentative Decision of March 11, 1985 as the Court's Statement of Decision. In the Statement of Decision the trial court states that it did not reach any issue raised in the litigation which is not discussed in the trial court's STATEMENT OF DECISION. (App. 48).

On May 2, 1985, the Court entered judgment in favor of the State ordering that Plaintiffs were to take nothing by way of their Complaint. (App. 49-50).

On May 23, 1985, Plaintiffs filed their Notice of Appeal. (App. 52-53). Thereafter, Appellant's Motion for Permission to Proceed Under California Rule of

Court 5.1 was granted, thereby permitting Appellants to file an Appendix in lieu of a Clerks Transcript On Appeal. (App. 58).

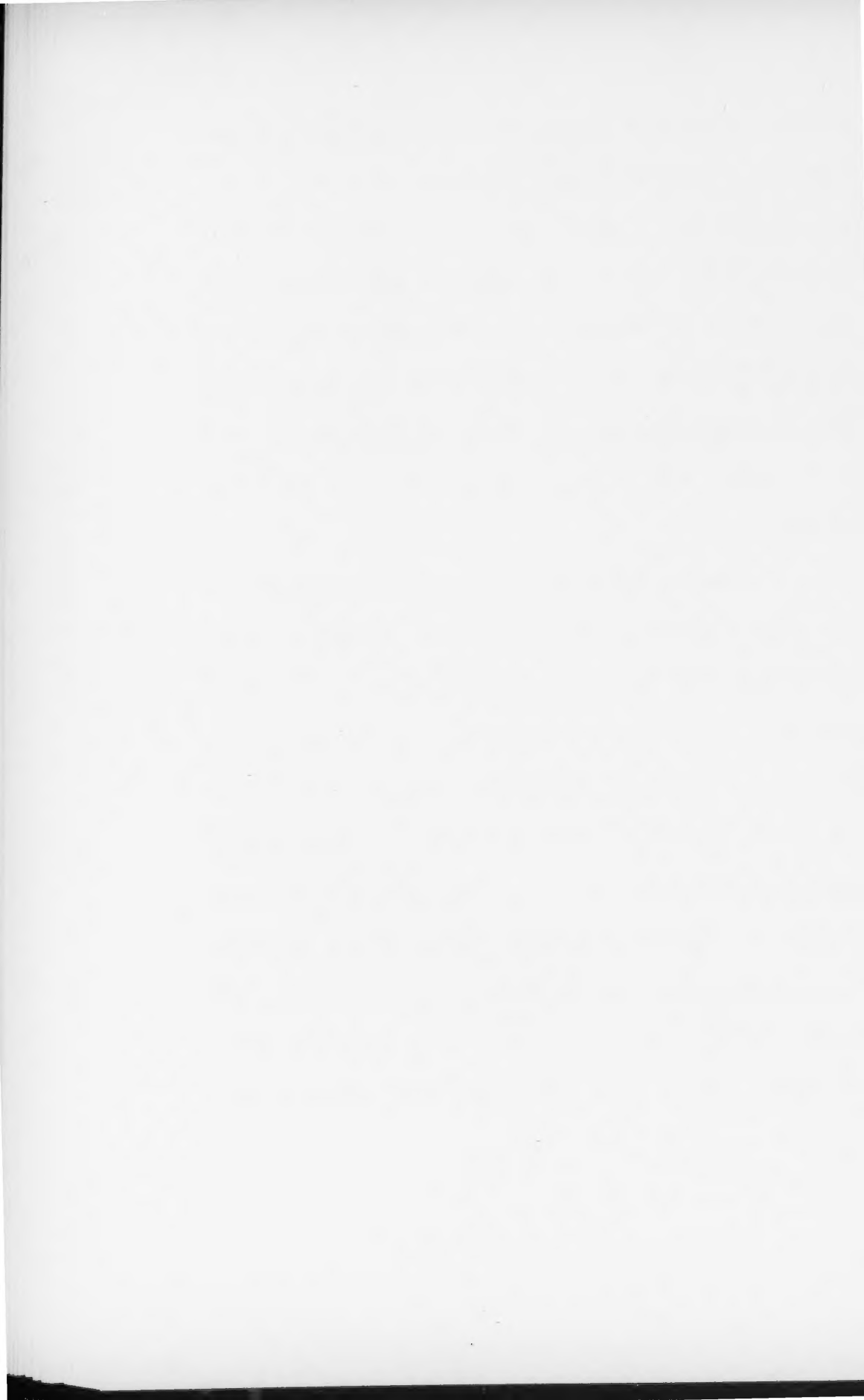
On May 20, 1986, the Appellate Court consolidated both Appeals for briefing, oral argument and decision. The Appellate Court also ruled that all further filings in conjunction with the two cases were to be filed under action no. A030412.

In the California Court of Appeal, Petitioners extensively briefed their contention that a compensable taking occurred within the meaning of the Fifth Amendment. (See, APPELLANT'S OPENING BRIEF, APPELLANT'S REPLY BRIEF, and Court of Appeals Opinion at p. 2a, *infra.*). The California Court of Appeal relied primarily on Aqins v. City of Tiburon (1979) 24 Cal.3d 266, 275, in affirming the trial court and holding that no compensable



taking occurred in this matter under either the California or United States Constitutions. See, p. 11a, *infra*. The California Court of Appeal also declined Petitioner's request to reexamine Aqins in light of this Court's decision in San Diego Gas & Electric Co. v. City of San Diego 450 U.S. 621, 101 S.Ct. 1287, 67 L.Ed.2d. 551 (1981).

A timely PETITION FOR REVIEW was filed in the California Supreme Court. The PETITION FOR REVIEW invited the California Supreme Court to re-examine its decision in Aqins v. City of Tiburon, *supra*, in light of this Court's observations in San Diego Gas & Electric Co. v. City of San Diego, *supra*. First English Evan. Luth. Church v. County of Los Angeles __U.S.__, 107 S.Ct.2378, 96 L.Ed.2d 250 (1987) was decided after the Petition for Review was



submitted to the California Supreme Court. On June 16, 1987, Petitioner's counsel filed a letter with the California Supreme Court advising it of the impact of First English Evangelical on the Petition for Review. On July 2, 1987, the California Supreme Court filed its Order denying the Appellants' Petition for Review. See, p.14a, infra.

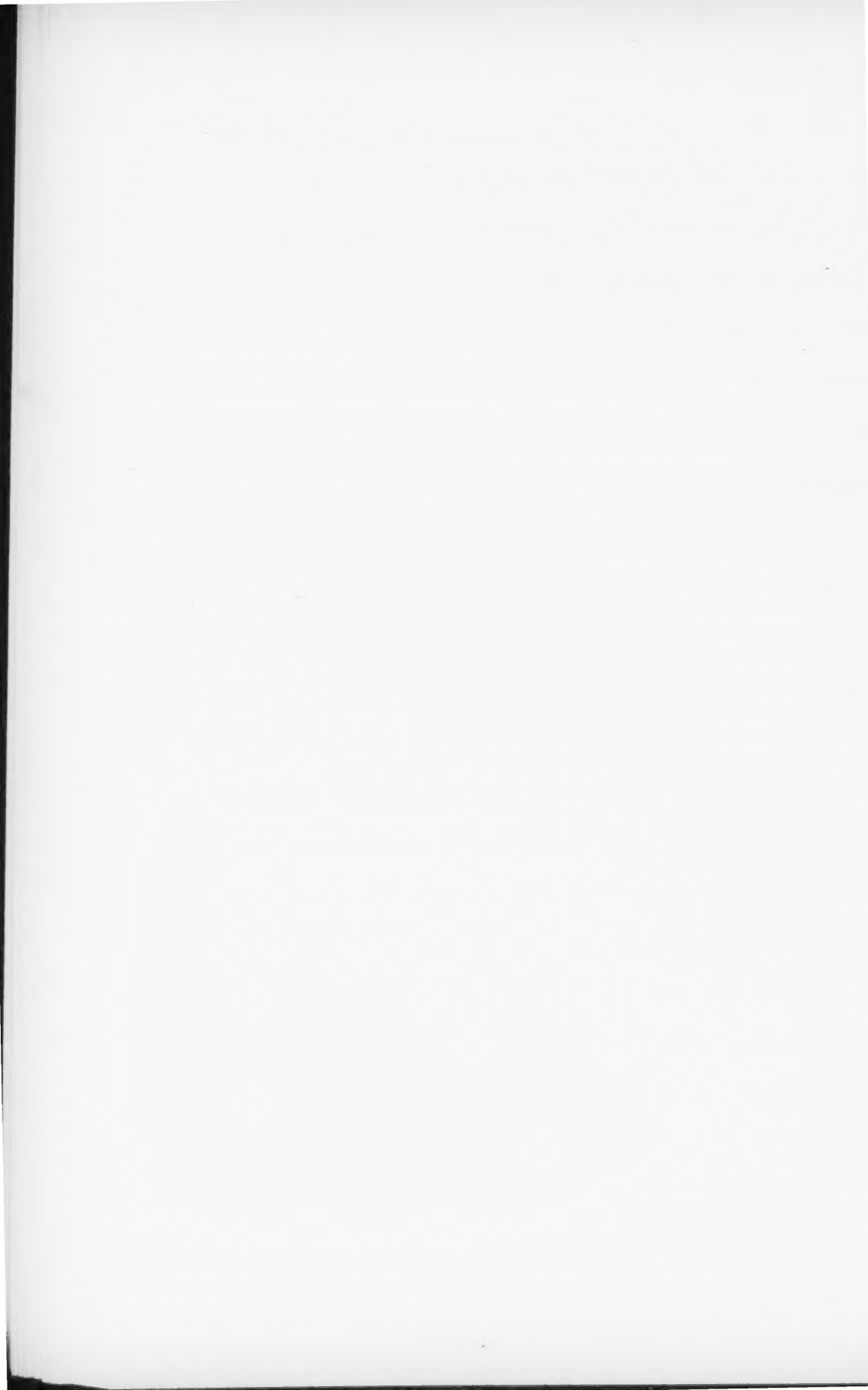
REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE CALIFORNIA COURT OF APPEAL CONFLICTS WITH A NUMBER OF DECISIONS OF THIS COURT INTERPRETING THE TAKING CLAUSE OF THE FIFTH AMENDMENT.

The California Court of Appeal has determined that no compensable taking occurred in this case under either the United States or California Constitutions

when the State enacted California Government Code §§16280 and 16280.5. Relying on the California Supreme Court's decision of Agins v. City of Tiburon (1979) 24 Cal.3d 266, 157 Cal.Rptr. 372, aff'd. 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980) and a similar case, the Court of Appeal determined that Petitioners could not sue in inverse condemnation; the only remedy available to Petitioners is an action to set aside the offending legislation.

Petitioners believe this case deserves this Court's attention and merits the granting of the within Petition. Petitioners believe the decision of the Court of Appeal is inconsistent with a number of decisions of this Court. Moreover, the Court of Appeal erred in relying on Agins v. City of Tiburon, supra,



in light of this Court's recent decision of First English Church v. County of Los Angeles, supra.

- A. Petitioners seek just compensation from the State measured by the interest on their withheld wages.

In Sonoma County Organization of Public Employees v. County of Sonoma (1979) 23 Cal.3d 296, the California Supreme Court declared unconstitutional the conditions of Government Code §§16280 and 16280.5 requiring State bail-out funds to be granted only to those local agencies which did not pay salary increases. The Court in Sonoma found §§16280 and 16280.5 to be unconstitutional impairments of contracts. The Court concluded, however, that the affected local public agencies were not



required to pay their employees interest on the wages withheld because the local agencies were prevented by law from paying those wages. Id. at 321.

Petitioner's inverse condemnation action seeks to recover from the State interest on the wages withheld from Petitioners and those similarly situated as a result of the enactment of Government Code §§16280 and 16280.5. As the Court recently observed in First English Evangelical Church v. County of Los Angeles, supra, 107 S.Ct at 2388,: "'It is the owner's loss, not the taker's gain, which is the measure of the value of the property taken [Citation].'" The value of use is measured by legal interest. As this Court stated in Albrecht v. United States 329 U.S. 599, 602, 67 S.Ct. 606, 608, 91 L.Ed. 532 (1947):



"Thus, 'just compensation' in a constitutional sense, has been held, absent a settlement between the parties, to be fair market value at the time of taking plus 'interest' from that date to the date of payment."

- B. The labor agreements between the agencies and their employees constitute an interest in property within the meaning of the Fifth and Fourteenth Amendments to the United States Constitution.

In the instant matter, the trial court determined that the employment contracts at issue are property rights which in appropriate circumstances may be

the subject of inverse condemnation. However, the trial court ruled that the enactment of Government Code §§16280 and 16280.5 was not a compensable taking of Petitioner's property rights within the meaning of the relevant provisions of the United States and California Constitutions. (App. 45-46). The Court of Appeal affirmed.

The AGREED UPON STATEMENT OF FACTS shows that each of the three Petitioner employee organizations was a party to a memorandum of understanding with a local public agency. Each of the memoranda of understanding provided for a salary or wage increase to members of the Petitioner's employee organizations which was not given to the employees or the employee members as a result of the enactment of Government Code §§16280 and 16280.5. But for the passage of Government Code §§16280 and



16280.5, the local public agency employers of Petitioners would have paid to Petitioners or their members the wage increases at the time they were due. Each of the local public agency employers withheld the salary or wage increases to avoid forfeiting state "bail out" funds pursuant to the said statutes. (App. 40-43).

No benefits of any kind were paid to Petitioners in lieu of the withheld wages. However, once the Supreme Court decided the Sonoma case, Petitioners received their withheld wage increases from their local public agency employers. Neither the County of San Mateo nor the City of Fresno paid interest to their respective employees on any amounts withheld as a result of Government Code §§16280 and 16280.5. The City of Oakland did pay to the affected Appellants a sum equal to 7% simple

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interest on the sums it withheld as a result of Government Code §§16280 and 16280.5 (Id.)

The enactment of Government Codes §§16280 and 16280.5 interfered with a binding, contractual right. Sonoma County, supra, at 304; Glendale City Employees Association, Inc. v. City of Glendale, (1975) 15 Cal.3d 328, 337-8. In Glendale, the California Supreme Court held that a Memorandum of Understanding entered into between representatives of an employee organization and a public employer, once approved by the legislative body of the local agency, has all the binding force and effect of a contract. Id. at 336-338.

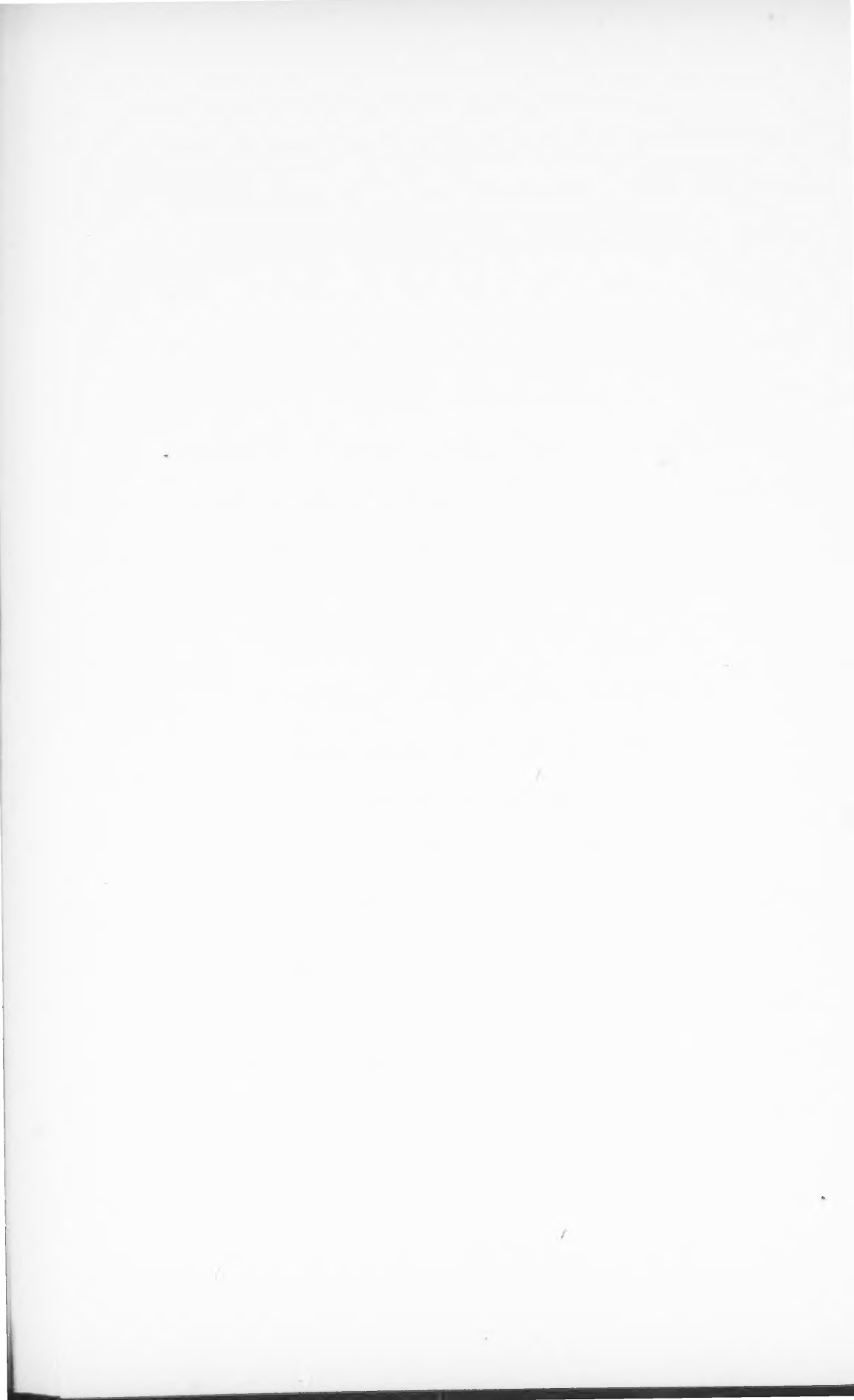
Contractual rights have long been considered by the United States Supreme Court to be property within the meaning of the Fifth Amendment's prohibition against



the taking of property for public use without just compensation. United States Trust Co. of N.Y. v. New Jersey, 431 U.S.1, 97 S.Ct. 1505, 52 L.Ed 2d 92 (1977); and Lynch v. United States, 292 U.S. 571, 54 S.Ct 840, 78 L.Ed. 1434 (1934). Thus, in United States Trust Co., supra, Justice Blackmun stated for the Court's majority:

"Contract rights are a form of property and as such may be taken for public purpose provided that just compensation is paid [citations]" (97 S.Ct. at 1516, n.16).

This constitutional prohibition is made applicable to the States by the Fourteenth Amendment: Griggs v. Allegheny County, 369 U.S. 84, 85, 82 S.Ct. 531, 7 L.Ed.2d 585 (1962); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415, 43, S.Ct. 158,



160 67, L.Ed322 (1922); Chicago, B. & Q.R. Co., v. Chicago, 166 U.S. 226, 241, 17 S.Ct. 581, 41 L.Ed. 979, 984 (1897). In the Chicago Railway case, supra, this Court concretely held that a taking by a State, without just compensation, would be violative of the due process clause of the Fourteenth Amendment.

C. Contractual rights similar to petitioner's have been held by this Court to be condemnable property under the taking clause of the Fifth Amendment.

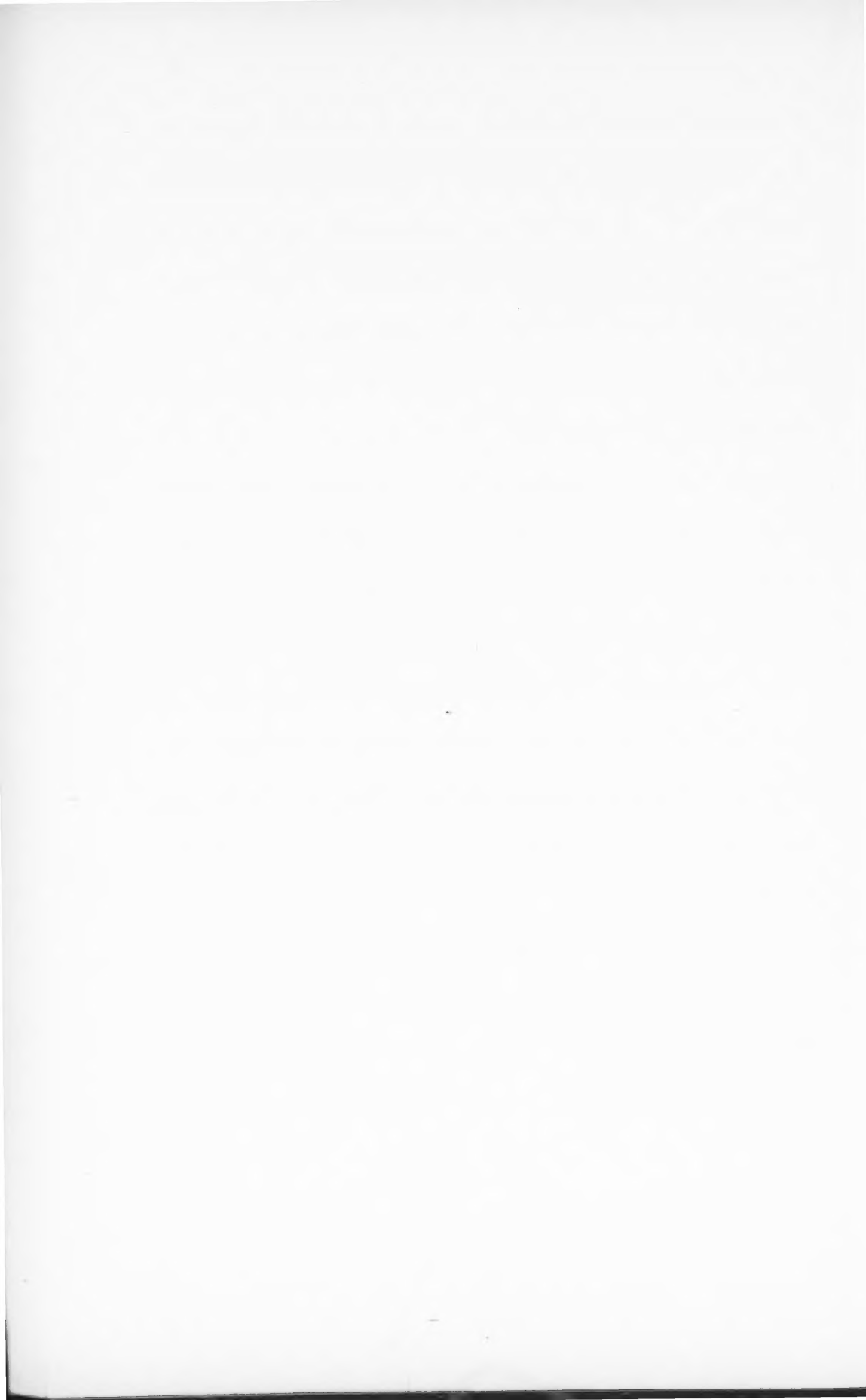
The California Court of Appeal states that Petitioners cite no authority establishing an action for inverse condemnation lies where a State enacts legislation in violation of the State and



Federal Constitution prohibitions against impairment of contracts. See, 11a, infra. The Court of Appeal's statement appears to merely rephrase the Agins rule that declaratory relief or mandamus are the exclusive remedies to challenge a State's excessive regulation.

It is respectfully submitted that the Appellate Court erred in its' statement. As previously stated, the United States Supreme Court has concluded that contract rights can be taken for a public purpose if just compensation is paid. United States Trust Co. of N.Y. v. New Jersey, supra at 97 S.Ct. at 1516, n.16.

United States Trust is on point. United States Trust involved the situation where State Legislation was held to violate the impairment of contracts clause of the



United States Constitution. Moreover, as previously stated, the Court noted that contract rights are property which could be taken for public purpose if just compensation is paid. (97 S.Ct. at 1516 n.16)

There are a number of additional decisions from this Court which establish contracts as condemnable property under the taking clause of the United States Constitution.

In Lynch v. United States, 292 U.S. 571, 54 S.Ct. 840, 78 L.Ed. 1434 (1934), this Court held that war-risk insurance policies were contracts, and therefore, property creating vested rights. Id. at 577, 54 S.Ct. at 842. Thus, a taking under the Fifth Amendment occurred when the war risk insurance policies were abrogated by Congress. This Court held that the Fifth Amendment required just compensation to be

paid. Id. at 579, 54 S.Ct. 843.

In Armstrong v. United States, 364 U.S. 40, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960), the Court held that the destruction of materialmen's liens on boats was a compensable taking under the Fifth Amendment. Id. at 48-49, 80 S.Ct. at 1569. The United States Supreme Court has held that the destruction of the value of a franchise is a compensable taking. Monongahela Navigation Co., v. United States, 148 U.S. 312, 13 S.Ct. 622, 37 L.Ed. 463 (1893). Finally, this Court's decision in First English Evangelical Luth. Church identifies a number of other decisions of this Court involving the taking of leasehold interests requiring just compensation. Id. at 107 S.Ct. 2387-88.



D. Supreme Court precedent exists under the taking clause of the Fifth Amendment to recover interest in an action for inverse condemnation when a taking of contractual rights occurs.

Liggett & Myers Tobacco Co., v. United States 274 U.S. 215, 47 S.Ct. 581, 71 L.Ed 1006 (1927) is closely analogous to the instant matter. In Liggett & Myers, a tobacco company was required to furnish the Navy tobacco products during World War I pursuant to an Act of Congress. Compliance with the request was mandatory. The government made an advance payment to the company which was subject to a final determination of the amount due and owing at a later time. The Court of Claims found the value of the tobacco products to be



\$483,504.30, and that the United States had paid on account the sum of \$423,893.96. The Government gave judgment for the difference of \$59,610.34.

The tobacco company sought review in the Supreme Court claiming that its tobacco products were taken under the power of eminent domain, that it was entitled to an additional amount representing the value of the property at the time of the taking, and that interest at a reasonable rate of interest was the measure of the amount required to make just compensation. This Court described the contentions of plaintiff as follows:

"The plaintiff contends that the products were taken under the power of eminent domain, and that it is entitled to such additional sum as will



produce the equivalent of their value paid at the time of the taking, and that interest at a reasonable rate is the measure of the amount required to be added in order to make just compensation."

Id. at 218, 47 S.Ct. at 581.

This Court described the issue as whether the facts constituted a taking by eminent domain. Id. The Court found the Navy's request for tobacco products was not an offer to purchase, but a command to deliver specified merchandise. The company's consent was not sought, and the company was not consulted as to quantity, price, time or place of deliver. The Court found that the Navy relied upon the compulsory provisions of the Acts of Congress. Id. at 220, 47 S.Ct. at 582.

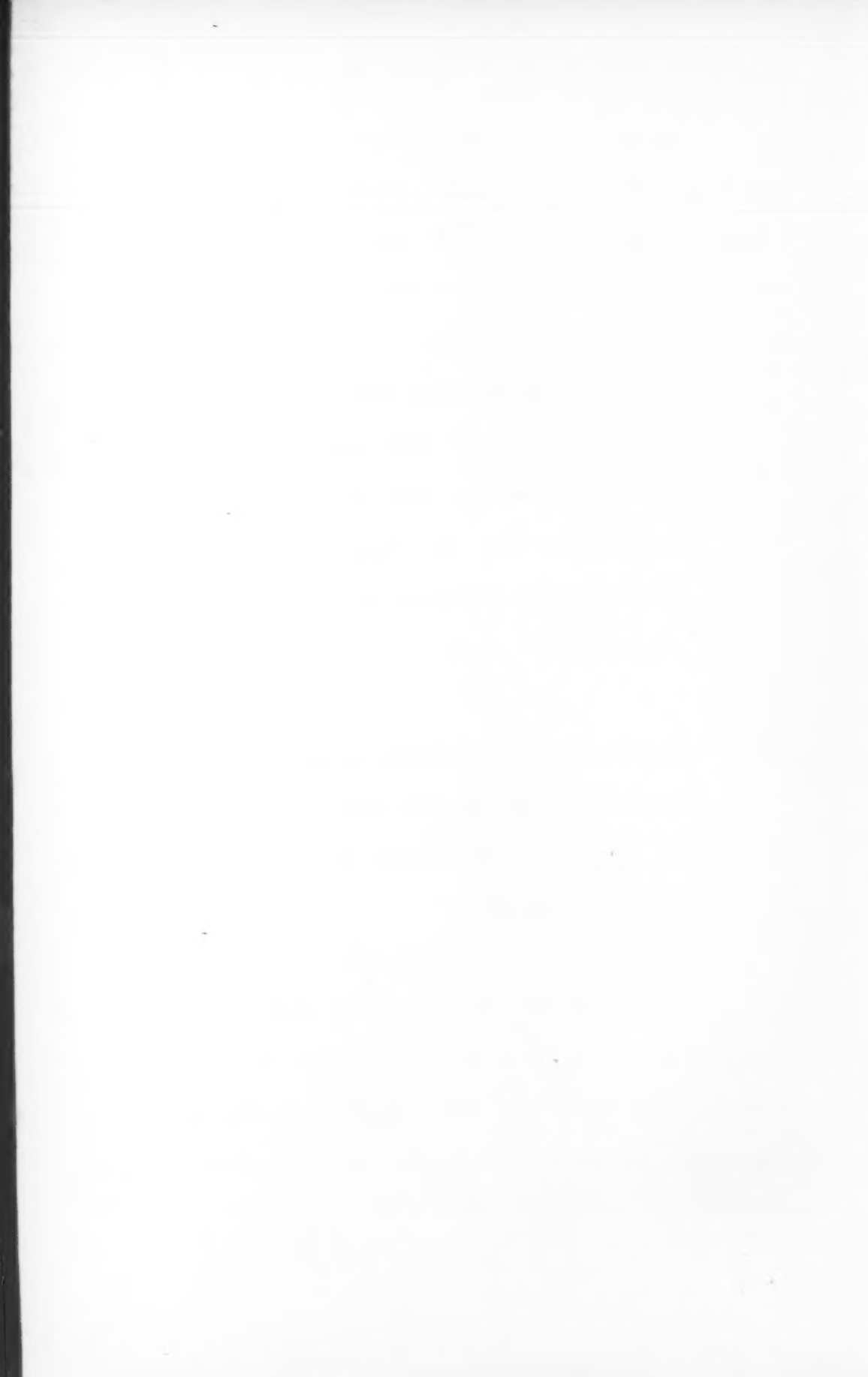


This Court held that a compensable taking had occurred, and the tobacco company was entitled to a reasonable interest it claimed. In so holding, the Court stated as follows:

"The findings show the Plaintiff's property was taken by eminent domain; and its just compensation includes the additional amount claimed. [Citation]" Id.

E. First English Church compels either the reversal of the California Court of Appeal or a remand for further consideration.

Petitioners respectfully submit that the California Court of Appeal erred in basing its decision upon Agins v. City of Tiburon, supra. In view of this Court's



recent decision of First English Church, the decision of the Court of Appeal should be reversed. In the alternative, Petitioners respectfully request this Court to remand the matter back to the California Court of Appeal for further consideration in light of First English Church.

The U.S. Supreme Court was unable to consider the merits of Aqins v. City of Tiburon, supra, on four occasions prior to First English Church, supra, 107 S.Ct. at 2383. In First English Church, this Court reconsidered and overrules the California Supreme Court's decision of Aqins v. City of Tiburon. Aqins had held, inter alia, that no compensable taking occurred for "temporary" regulatory takings. An aggrieved party was limited to non-monetary relief.

In First English Church, this Court resolved the issue of whether the just



compensation clause of the Fifth Amendment requires the government to pay for temporary regulatory takings. In resolving the issue, this Court focused on a number of its prior decisions which had held compensable takings occurred where the government had only temporarily exercised its rights to use private property. Id. at 2387-88.

This Court states in First English Church: "Invalidation of the ordinance or successor ordinance after this period of time, though converting the taking to a 'temporary' one is not a sufficient remedy to meet the demands of the Just Compensation Clause." Id. at 2388.

The Court concludes in First English Church by holding that just compensation is required under the Fifth and Fourteenth Amendments where a temporary taking denies a property owner all use of his property.

In so holding, the Court states as follows:
"We merely hold that when the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period in which the taking was effective." Id. at 2389. Therefore, First English Church overrules the California Supreme Court's interpretation of the Fifth Amendment in Agins v. City of Tiburon, supra.

In this matter, the Petitioners come squarely within the holding of this Court's decision in First English Church. The Petitioners where denied the use and enjoyment of contractual obligations requiring the payment of salary increases during the 1978-1979 fiscal year until the California Supreme Court's decision in Sonoma County. The stipulated facts show that the County of San Mateo paid



Petitioners the withheld increases on May 11, 1979. (App. 41). The City of Fresno paid the Petitioners the withheld wages on April 2, 1979. (App. 42). On March 16, 1979, the City of Oakland paid these Petitioners the withheld wages, and on April 25, 1979, 7% simple interest was paid to the Petitioners. (Id.) The withheld wages were due Petitioners on or about July 1, 1978. (App. 41, 42). Thus, the period of the temporary taking at issue in this case varies from ten to eleven months.

As the California Supreme Court observed in the Sonoma County case, the very heart of an employment contract is the provisions concerning wage increases. The California Supreme Court stated as follows:

"An increase in wages is frequently the very heart of an employment contract; other provisions, including those



relating to fringe benefits, are inextricably interwoven with those relating to wages, since employees may surrender various employment benefits in exchange for a wage increase." Id. at 308-9

Therefore, the just compensation clause of the Fifth Amendment compels payment by the State for the temporary taking of the very heart Petitioners' employment contracts: Their respective contracted for salary or wage increases during fiscal year 1978-1979. The measure of just compensation in this case is interest on the sums withheld from Petitioners' pay checks for the period of the taking.



CONCLUSION

For the foregoing reasons, it is respectfully requested that this Petition for Writ of Certiorari be granted. Petitioners respectfully request this Court to reverse the California Appellate Court and conclude that a compensable taking occurred within the meaning of the Fifth Amendment of the United States Constitution. In such an event, Petitioner requests this Court to remand the matter back to the California Appellate Court with directions to decide the remaining issues presented to the California Court of Appeal.

Alternatively, it is respectfully requested that this Petition for Writ of Certiorari be granted, the Opinion of the California Court of Appeal be vacated, and the case remanded to the California Court



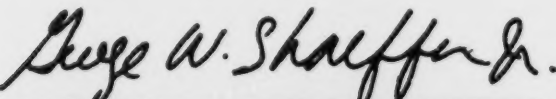
of Appeal for further consideration in
light of this Court's recent opinion in
First English Evangelical Lutheran Church
v. County of Los Angeles, supra.

DATED: Sept. 28, 1987
Newport Beach, CA

Respectfully submitted,

CARROLL, BURDICK & McDONOUGH
CHRISTOPHER D. BURDICK
PHILIP M. MILLER

SILVER, KREISLER, GOLDWASSER
& SHAEFFER
A Professional Law Corporation
GEORGE W. SHAEFFER, JR.

By 
GEORGE W. SHAEFFER, JR.
Attorneys for Petitioners



FILED MARCH 19, 1987
[Clerk ILLEGIBLE]

CERTIFIED FOR PUBLICATION
IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE

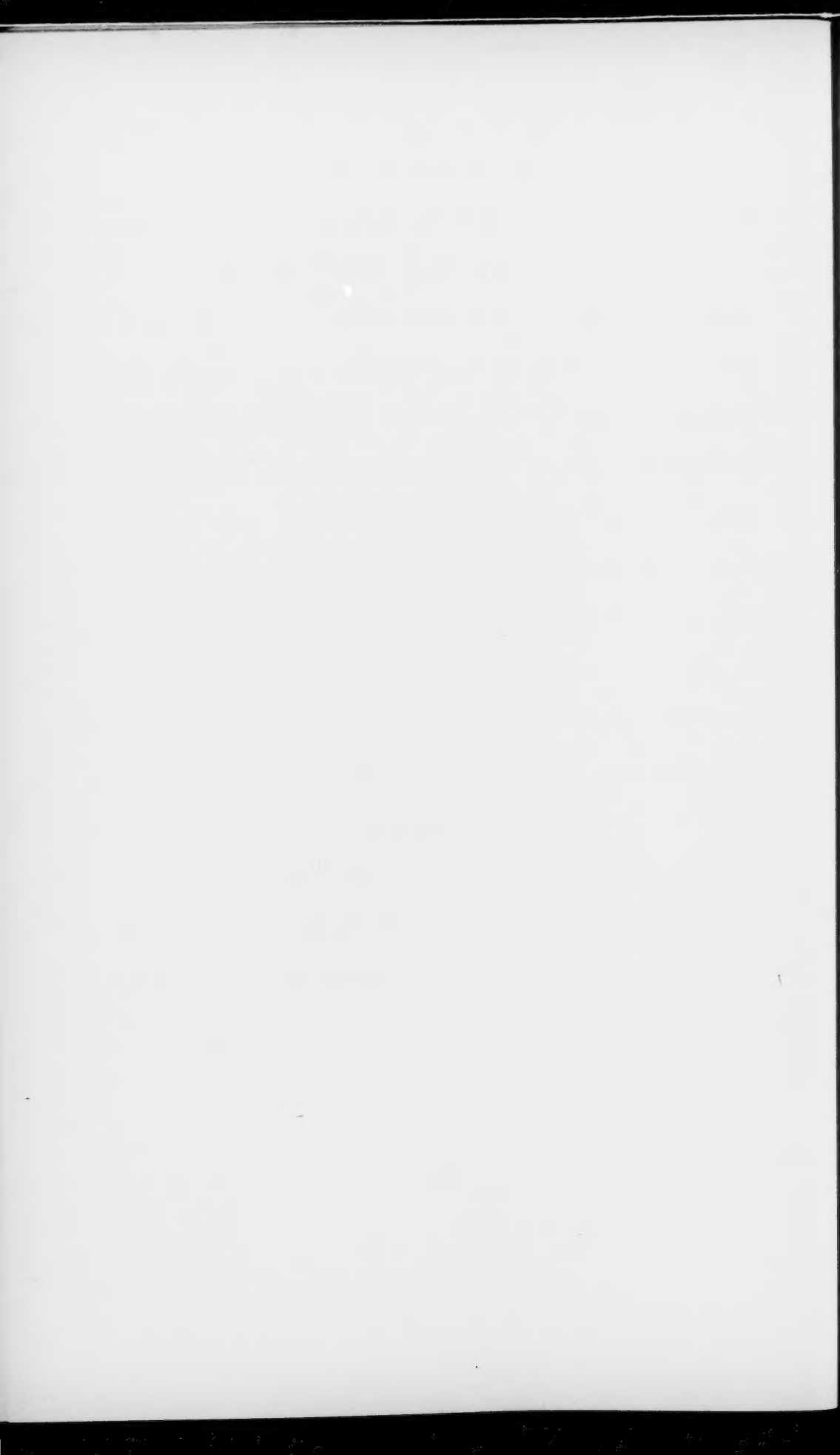
FRESNO POLICE OFFICERS ASSOCIATION;
OAKLAND POLICE OFFICERS ASSOCIATION;
ORGANIZATION OF DEPUTY SHERIFFS OF SAN
MATEO COUNTY; BILL BETZOLD; ROBERT
FOSTER; and FRANK KASTELL,
Plaintiffs and Appellants. A030412, A031651

v.

STATE OF CALIFORNIA; and KENNETH
CORY, State Controller, San Francisco
Defendants and Respondents. County Superior
Crt No. 763394



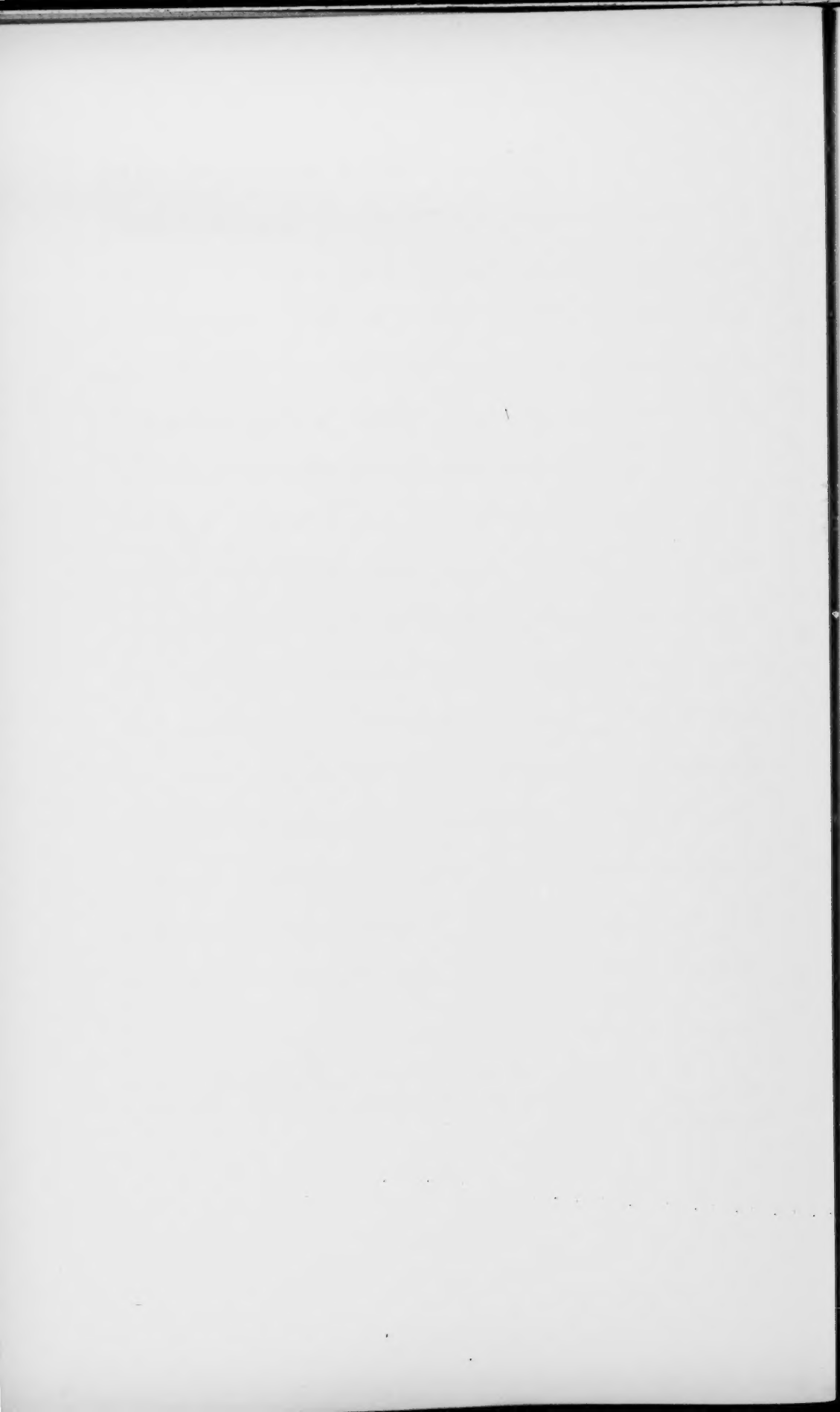
In this consolidated appeal plaintiffs Fresno Police Officers Association, Oakland Police Officers Association, the Organization of Deputy Sheriffs of San Mateo County, Bill Betzold, Robert Foster, and Frank Kastell appeal a judgment after court trial in favor of respondents State of California and State Controller Kenneth Cory in appellants' action for inverse condemnation. Appellants contend their employment agreements with their employing agencies constitute property interests which the state took or damaged without just compensation when it refused to pay interest on salary increases withheld pursuant to Government Code §§16280 and



16280.5.,¹ after those statutes were declared unconstitutional in Sonoma County Organization of Public Employees v. County of Sonoma (1979) 23 Cal.3d 296. Appellants also contend the trial court abused its discretion in denying class certification.

Appellants are local public employee organizations and individual public employees whose employment agreements with their employing agencies entitled them to receive cost-of-living salary increases for the fiscal year 1978-1979. Following the passage of Proposition 13 (Cal. Const., Art. XIII A [limiting the revenue local entities can raise through property taxes]) in June 1978, the Legislature enacted chapter 4 (§§16280 and 16280.5) of the

¹ Unless otherwise indicated, all further statutory references are to the Government Code.



Government Code, effective June 30, 1978. Chapter 4 authorized distribution of surplus funds in the state treasury to local governmental agencies "to alleviate the current fiscal crisis created by the passage of Proposition 13...and to provide for maintaining essential services which would otherwise be lost." (§16281.) Section 16280 prohibited the distribution of state surplus to any local agency granting its employees a cost-of-living salary increase for 1978-1979 exceeding the cost-of-living increase provided for state employees. Section 16280.5 prohibited distribution of surplus funds to local agencies providing an increase in salary in 1978-1979 to elected or appointed non-civil service officers. Any agreement providing for a cost-of-living salary increase to local employees in excess of that granted state



employees was declared null and void.

In February 1979 Sonoma County Organization of Public Employees v. County of Sonoma, supra, 23 Cal.3d at p. 321, held that §§16280 and 16280.5 violated both the state (Cal.Const., Art. I, §9) and federal (U.S. Const., Art. I, §10) Constitutions as an impairment of the obligations of contract, and as violative of the home rule provision of Article XI, §§4 and 5 of the California Constitution.² The Supreme Court ordered the local entities to pay the salary increases withheld, but denied payment of interest on the ground that

² California Constitution, Article XI, §§4 and 5, grant charter counties and charter cities, respectively, plenary power to determine the amount of compensation of their officers and employees. (See, e.g., Sonoma County Organization of Public Employees v. County of Sonoma (1979) 23 Cal.3d 296, 316-318.) Appellants make no similar claim in the instant case concerning Article XI.



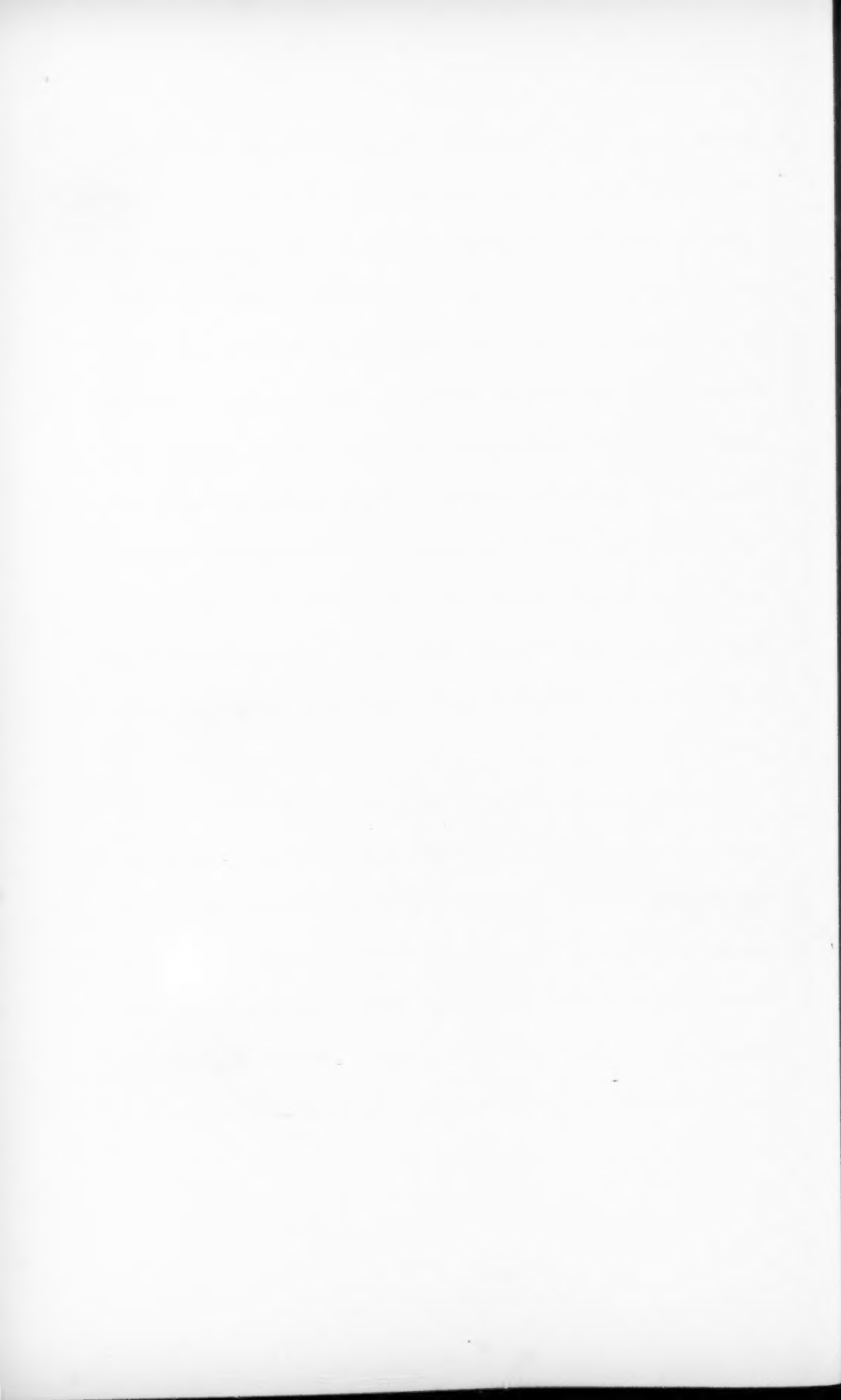
"[p]rejudgment interest is not allowed if the debtor 'is prevented by law...from paying the debt.' (Civ. Code, §3287.)" (Id., at p. 321.)

Following the Sonoma County decision, appellants brought the instant action for inverse condemnation seeking interest on salary increases which were delayed until §§16280 and 16280.5 were declared unconstitutional. They alleged, inter alia, (1) their right to a cost-of-living salary increase constituted a contract right, which is an interest in property which cannot be taken or damaged for public use by the state without just compensation; (2) the adoption of §§16280 and 16280.5 constituted a taking or damaging of that property right within the meaning of California Constitution, Article 1, §19 and the Fifth and Fourteenth Amend-



ments of the United States Constitution; (3) the taking or damaging of the contract right was for a public use; (4) the taking or damaging of the contract right denied appellants the use and enjoyment of the withheld cost-of-living increases, which loss can be measured by the legal rate of interest on said sums. They also sought an accounting of the amount of unpaid wages and the legal rate of interest thereon for all local employees who had cost-of-living increases withheld pursuant to §§16280 and 16280.5.

The parties stipulated that (1) appellants have been paid the amounts withheld under §§16280 and 16280.5, and are now seeking payment for loss of use thereof; (2) it was the local public agencies, not respondents, which withheld the cost-of-living increases; (3)



respondents did not have control over, receive nor retain any funds due appellants as salary increases; (4) but for the passage of §§16280 and 16280.5 the local agencies would have paid appellants their contractual salary increases, but withheld them to avoid forfeiting state "bail-out" funds.

The trial court held that "the enactment of Government Code §§16280 and 16280.5 did not constitute a taking or damaging of private property within the meaning of Article I, §19 of the California Constitution or of the Fifth and Fourteenth Amendments of the United States Constitution," and granted judgment in respondents' favor.

Inverse condemnation is a procedural devise for "insuring that the constitutional proscription that '[p]rivate



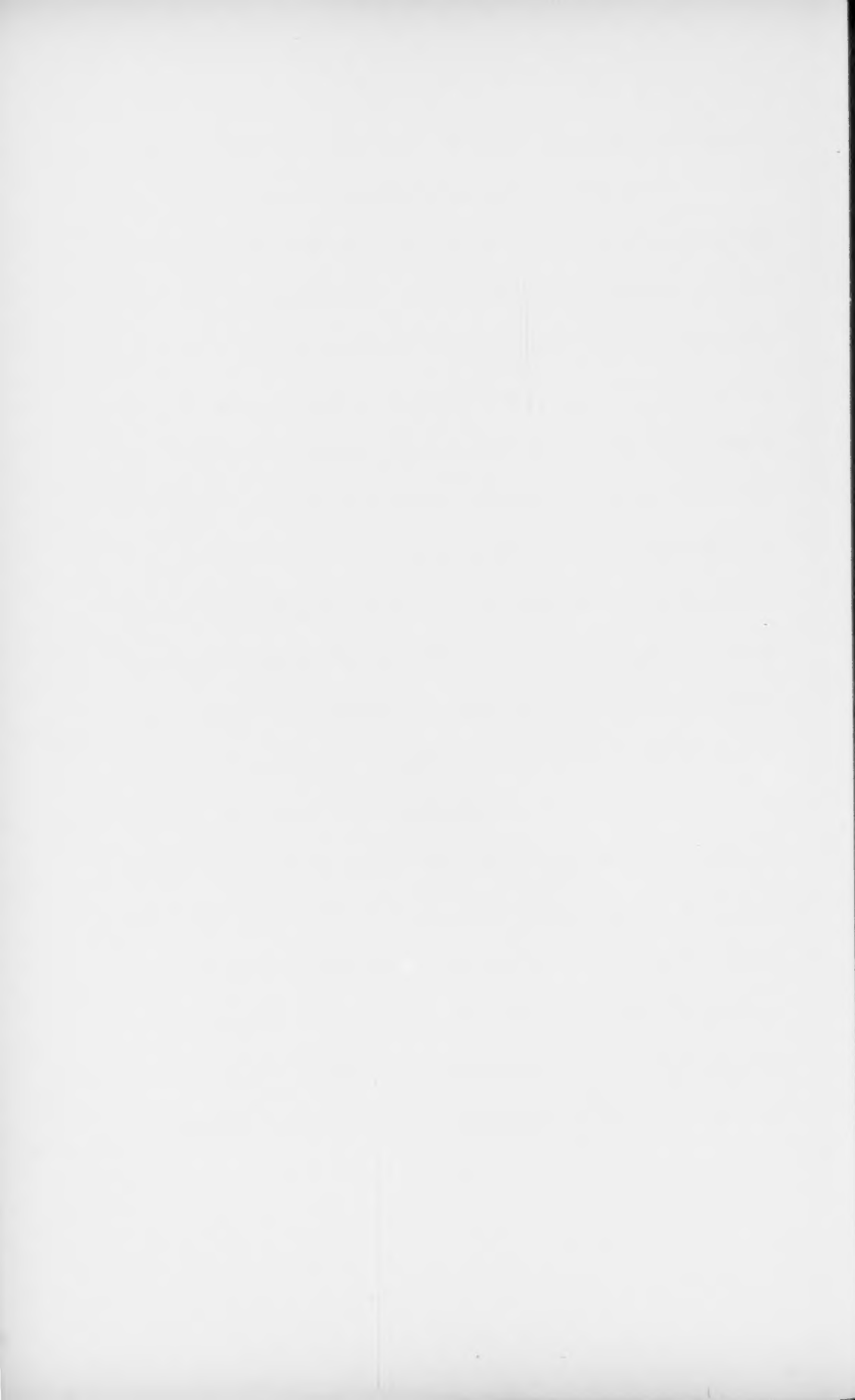
property shall not be taken or damaged for public use without just compensation having first been made to ... the owner ...' is not violated. [U.S. Const., 5th Amend.; Cal.Const., Art. I, §19.]" (Klopping v. City of Whittier (1972) 8 Cal.3d 39, 43.) It "'....is the name generally ascribed to the remedy which a property owner is permitted to prosecute to obtain the just compensation which the Constitution assures him when his property without prior payment therefor, has been taken or damaged for public use.'" (Sheffet v. County of Los Angeles (1970) 3 Cal.App.3d 720, 732, citing with approval Van Alstyne, Statutory Modification of Inverse Condemnation: The Scope of Legislative Power, 19 Stan.L.Rev 727, 730.) "In order to state a cause of action for inverse condemnation, there must be an invasion or an appropriation of some

valuable property right which the [owner] possesses and the invasion or appropriation must directly and specially affect the [owner] to his injury." (Shelby Realty Co. v. City of San Buenaventura (1973) 10 Cal.3d 110, 119-120.) Damages include compensation for the property taken or damaged and, if the owner has been deprived of possession before compensation is made, compensation for loss of use of the property. Normally the value of use is legal interest. (City of San Rafael v. Wood (1956) 144 Cal.App.2d 604, 607; see 5 Witkin, Summary of Cal. Law (8th ed 1974) Constitutional Law, §567, p. 3867.) An action lies for the taking of personal as well as real property. (City of Oakland v. Oakland Raiders (1982) 32 Cal.3d 60, 65; Sutfin v. State of California (1968) 261 Cal.App.2d 50, 53; see also County of San



Diego v. Miller (1975) 13 Cal.3d 684, 691.)

However, appellants have cited no authority for the proposition that legislation enacted in violation of the state and federal constitutional prohibitions against impairment of contractual obligations give rise to an action for inverse condemnation. As "a principal of law and a necessity of rational government[,] both constitutional and institutional understandings require that legislative acts, even if improper, find their judicial remedy in the undoing of the wrongful legislation, not in money damages awarded against the state." (HFH, Ltd. v. Superior Court (1975) 15 Cal.3d 508, 519.) "[I]nverse condemnation is an inappropriate and undesirable remedy in cases in which unconstitutional regulation is alleged." (Agins v. City of Tiburon



(1979) 24 Cal.3d 266, 275.)

Appellants contend that the HFH and Agins decisions are limited to issues involving land use regulation, and are therefore inapplicable to the instant controversy. We disagree, concluding that the HFH and Agins principles have broader application. To conclude otherwise would lead to the serious impediment, if not prevention, of a broad spectrum of legislative action. We cannot impose liability on the state for fulfilling its basic task of governing. (See, HFH, Ltd. v. Superior Court, supra, 15 Cal.3d at p. 519.)

In light of our disposition of the inverse condemnation issue, appellants' remaining contentions are moot.



Affirmed.

HANING, J.

We concur:

LOW, P.J.

KING, J.

A030412, A031651

Fresno Police Officers etc., et al., v.
State of California.

SUPREME COURT FILED
JULY 2, 1987 BY
LAURENCE P. GILL, CLERK

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

1ST DISTRICT, DIVISION 5,

NO. A030412, A031651, S000731

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA
IN BANK

FRESNO POLICE OFFICERS ASSOCIATION et al.

v.

STATE OF CALIFORNIA et al.

Appellants' Petition for Review DENIED.

LUCAS

Chief Justice

14 a

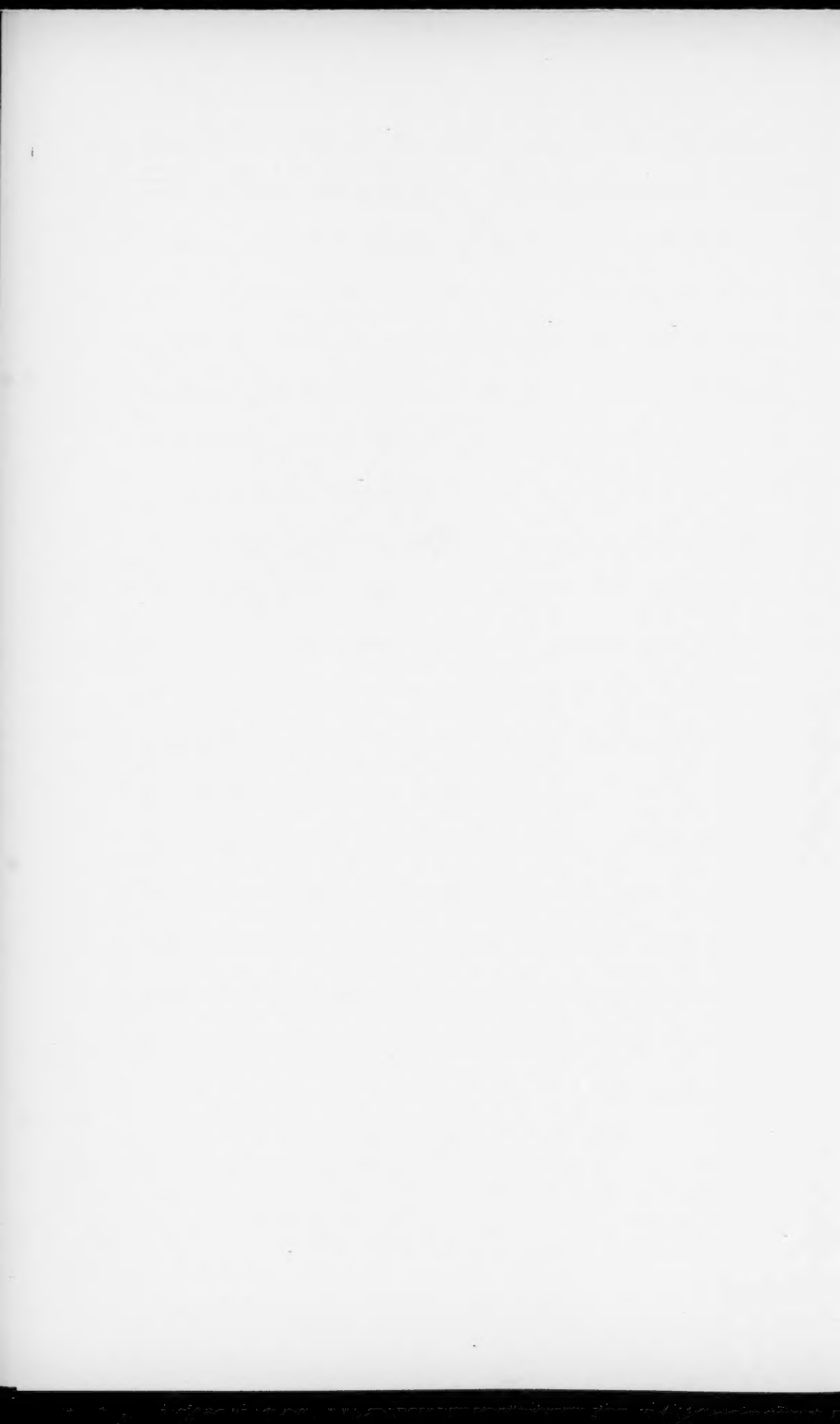


California Government Code §16280:

No State funds from the state surplus or state loan shall be available to any local public agency which provides a cost of living wage or salary increase in the 1978-79 fiscal year for local public agency employees or cost of living increases for any other individuals, including ADFC and other welfare recipients, if such increase is in excess of the cost of living salary increase provided for state employees. The cost of living salary increase provided for state employees shall be determined by dividing the total amount made available by the Legislature for salary increases to state employees by the total salaries paid to state employees. If the Legislature limits the cost of living salary increase for state employees on the basis of salary range, the local public agency shall

likewise limit any cost of living increase for public agency employees and other individuals on the same basis. Any provision of a contract, agreement, or memorandum of understanding between a local public agency and an employee organization or an individual employee which provides for a cost of living wage or salary increase to local public agency employees in excess of such increase provided for state employees is null and void, to the extent of such excess.

This section shall not preclude regular merit increases, established prior to June 6, 1978, longevity or education increments, promotions, or transfers, but shall preclude the transfer of employees to new positions created with higher pay schedules for the purpose of circumventing this chapter.



As used in this section, the terms "salary" and "wage or salary" shall not include any compensation other than wages or salaries, such as, vacation time, sick leave, or health benefits.

The amendments of this section made by the provisions of S.B. 2212 of the 1977-78 Regular Session of the Legislature does not constitute a change in, but is declaratory of, the existing law.

California Government Code §16280.5:

No state funds from the state surplus or state loan funds shall be available to any local public agency which provides an increase in compensation in the 1978-79 fiscal year to any elected or appointed non-civil service officer of the local public agency.

Any provision of a contract or



agreement between a local public agency and an elected or appointed non-civil service officer of the local public agency which provides for an increase in compensation is null and void.

As used in this section, the term "compensation" includes wages, salaries, and other employment benefits such as health benefits, retirement benefits, life insurance, perquisites of all kind, and reimbursement of expenses.

California Government Code §16281:

It is the intent of the Legislature in enacting this chapter to alleviate the current fiscal crisis created by the passage of Proposition 13 (Article XIII A of the California Constitution), and to provide for maintaining essential services which would otherwise be lost.

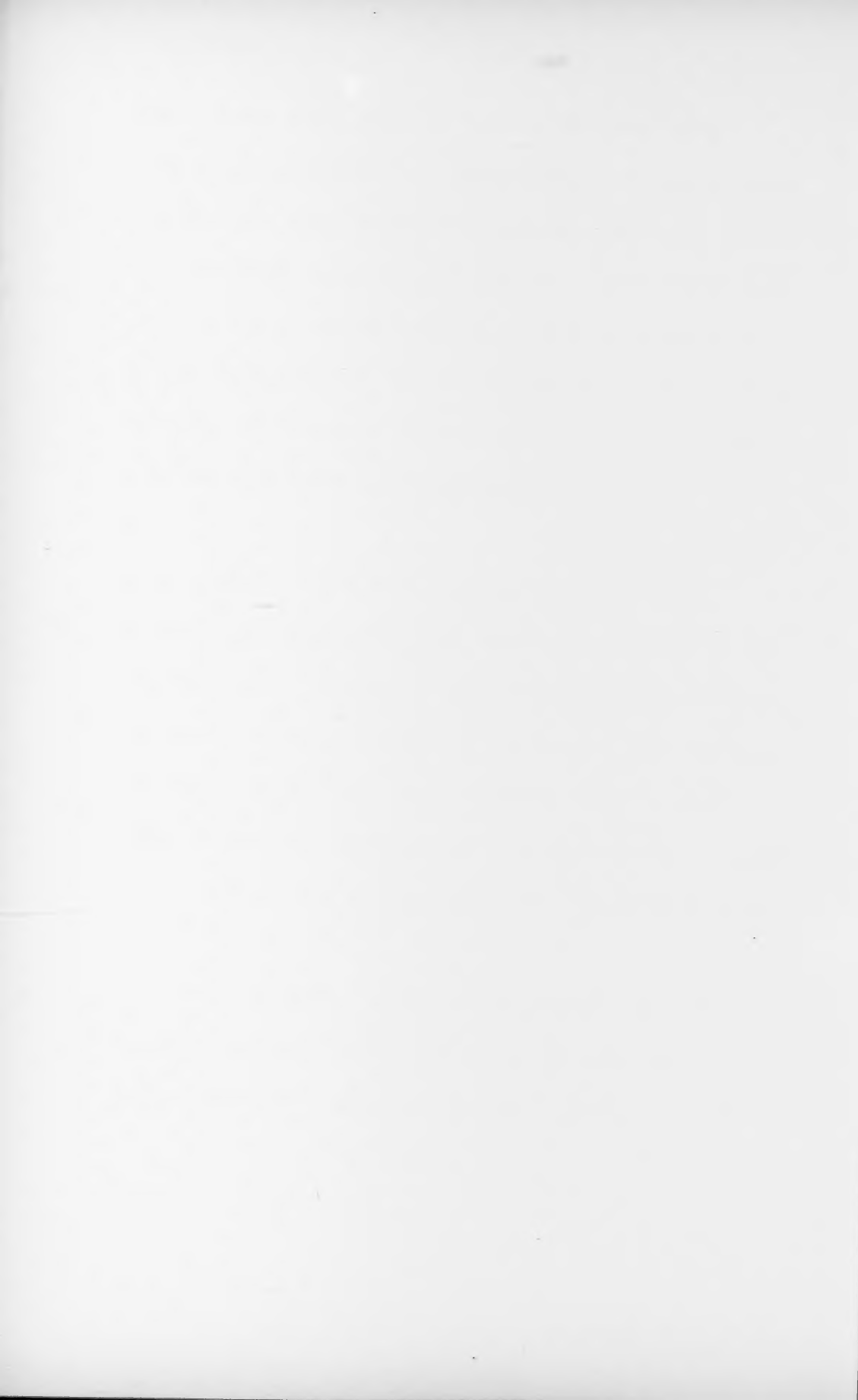


The Legislature finds and declares that limiting increases in compensation for local public agency officers and employees and cost of living increases for other individuals will allow essential local government services to be maintained at a higher level than would otherwise be the case, and will promote full employment and prevent layoffs.

The Legislature further finds and declares that this chapter constitutes a matter of statewide concern, and shall apply to charter counties and charter cities. The provisions of this chapter shall supersede any inconsistent provisions in the charter of any county or city.

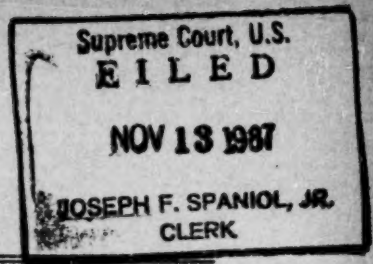
California Government Code §16282:

For the purpose of this chapter "local public agency" means a city, county, city



and county, special district, school district, county board of education or community college district.

NO. 87-557



IN THE
SUPREME COURT
OF THE UNITED STATES

October Term, 1987

FRESNO POLICE OFFICERS ASSOCIATION, et al.,
Petitioner

v.

STATE OF CALIFORNIA, et al., Respondents

RESPONSE TO PETITION FOR A WRIT OF
CERTIORARI TO THE CALIFORNIA
COURT OF APPEAL
FIRST APPELLATE DISTRICT, DIVISION FIVE

JOHN K. VAN DE KAMP
Attorney General of the State of
California
MARY MICHEL
Supervising Deputy Attorney
General
ROBERT E. MURPHY
Deputy Attorney General
350 McAllister Street, Rm 6000
San Francisco, California 94102
Telephone: (415) 557-3946

Attorneys for Respondents

2700

i.

QUESTIONS PRESENTED

1. Can a public employee's contractual right to receive increased wages be the subject of an inverse condemnation action to invalidate legislation adopted by a State which restricts a public employer's right to pay increased wages from funds received by the employer, a local public entity, from the state?

2. Can employees who have received the benefit of, and who are bound by, a State court decision invalidating state legislation as creating an unconstitutional impairment of contract bring a subsequent inverse condemnation action based on the same legislation to recover interest lost because of the impairment created by the invalidated legislation?

LIST OF PARTIES

The Respondents before this Court are the State of California and the Controller for the State of California.

The Petitioners before this Court are The Fresno Police Officers Association, the Oakland Police Officers Association, the Organization of Deputy Sheriffs of San Mateo County, Bill Betzold of the Fresno Police Officers Association, Robert Foster of the Oakland Police Officers Association, and Frank Kastell of the San Mateo County Deputy Sheriffs Association.

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1.

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1987

FRESNO POLICE OFFICERS ASSOCIATION,
et al.,
Petitioners

v.

STATE OF CALIFORNIA, et al.,
Respondents

RESPONSE TO PETITION FOR A WRIT OF
CERTIORARI TO THE CALIFORNIA
COURT OF APPEAL
FIRST APPELLATE DISTRICT, DIVISION FIVE

Respondents State of California and
Controller of the State of California
makes this response to the Petition for
Writ of Certiorari and pray that the
petition be denied.

OPINIONS BELOW

The opinions below are accurately stated in the Petition for Writ of Certiorari and appropriately appear in the appendix thereto.

JURISDICTION

Respondents agree that the jurisdiction of this court is invoked under 28 U.S.C. section 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Respondents agree with Petitioner's statement of the Constitutional Provisions and Statutes Involved. The Fifth and Fourteenth Amendments of the United States Constitution are involved as are California Government Code sections 16280, 16280.5, 16281, and 16282. All of these sections appear in the appendix to the petition.

STATEMENT OF THE CASE

Following adoption of California Government Code section 16280, et seq. a group of public employees challenged the validity of those sections arguing that they impaired their contractual right to receive wages in violation of the impairment of contract clauses of the United States and California Constitutions. U.S. Const., art. I, Sec. 10; Cal. Const., art. I, Sec. 9. Sonoma County Organization of Public Employees v. County of Sonoma (1979) 23 Cal.3d 96. The challenged Government Code sections were held to be violative of both the federal and state constitutions. Id. Although requested to do so, the California Supreme Court refused to award Petitioner's interest lost wages withheld. Id. at 321.

Following the decision in Sonoma, the present action in inverse condemnation was filed seeking to recover the interest

denied in Sonoma.

Following the trial court's denial of all relief to Petitioners, an appeal to the California Court of Appeal was perfected. The opinion affirming the trial court decision appears at 190 Cal.App.3d 413.

SUMMARY OF ARGUMENT

The present case involves not just the case itself, but the disposition of the constitutional challenges to California Government Code section 6820, et seq. by the California judicial system. In Sonoma County Organization of Public Employees v. County of Sonoma, supra, 23 Cal.3d 296, the California Supreme Court disposed of challenges to the constitutional validity of those sections by holding them invalid as violative of the impairment of contract clauses contained in the Federal and State Constitutions. That decision has now become final and both respondents and

petitioners are bound by it.

The present action seeks no declaration that the challenged statutes are invalid but rather seeks only an independent cause of action for damages based on an alleged inverse condemnation which relies on the declaration of invalidity contained in Sonoma.

Respondents first argue that regardless of the underlying merits of Petitioners arguments, this in an inappropriate case for the exercise of this court's jurisdiction because of the unusual and complicated factual and legal background out of which is arises. Specifically Respondents will argue that the second and third questions posed by Petitioners are both premature in that no California court has had an opportunity to rule on these questions.

Respondents will also argue that the issue of whether legislation which

restricts an employee's right to receive wages from a public entity is subject to attack under the Impairment of Contract Clause or under the Taking Clause of the Fifth Amendment is not an important issue deserving this Court's attention. No conflicts exist between any court because, as far as Respondents have been able to discover, this issue has not been ruled on by any other court. Further given the unusual circumstances out of which this case arises, it is unlikely that it will be raised again in the future.

Next Respondents will argue that an action in inverse condemnation will not lie to challenge the constitutional validity of legislation which impairs a contractual right to receive an increase in wages of public employees.

REASONS FOR DENYING WRIT

I. THIS IS AN INAPPROPRIATE CASE FOR REVIEW BY THIS COURT BOTH BECAUSE OF ITS PROCEDURAL STATUS AND ITS COMPLICATED FACTUAL BACKGROUND RELATED TO THE LEGAL ISSUE PRESENTED.

A. Under California Law The Action Sought To Be Reviewed Herein Is barred By The Doctrine Of Collateral Estoppel.

As the Statement of the Case contained in the Petition for a Writ of Certiorari (hereinafter Petition) shows in the case of Sonoma County Organization of Public Employees v. County of Sonoma supra, 23 Cal.3d 296, the California Government sections here at issue, Sections 16280 and 16280.5, were held to be invalid in that they impaired

contractual rights in violation of both the California and the United States Constitutions. Petition 6,7. The issue of the employees' right to interest on the unpaid wages was presented in that case. The California Supreme Court held that as a matter of California law, interest was not available. Petition 7. No review of that decision was sought in this court. That decision having become final, petitioners in the present case are bound by it even though they were not parties to Sonoma.

As held in Risenberger v. Dairymen's Fertilizer Co-op Inc. (1968) 266 Cal.App.2d 269 at 278:

If it appears that a particular party, although not before the court in person, is so far represented by other that his interest received actual and efficient protection, the decree will be held to be binding upon him. [citation] . . . 'The rule should not be defeated by minor differences of form, parties, or allegations, when these are contrived only to obscure the real purpose-- a second trial on the same cause

between the same parties" Hockman v. Mortgage Finance Corp. 289 Pa. 260 [137 A.252,253] [citation].

The California Court of Appeal did not reach this collateral estoppel issue in the present case because the matter was decided solely on the basis of the California Supreme Court's decisions in HFH, Ltd. v. The Superior Court (1975) 15 Cal.3d 508 and Agins v. City of Tiburon (1979) 24 Cal.3d 266.

The Sonoma decision has now been final for eight years. The present action thus is not truly an attempt to recover under a theory inverse condemnation but rather is an attempt to breathe new life into a long dead cause of action. What petitioners in fact seek is "a second trial on the same cause between the same parties" Id. The invalidation of Government Code sections 16280 and 16280.5 inured to the benefit of all public employees including petitioners herein.

They should not now be allowed to burden this Court's crowded calendar by urging a new legal theory on the same set of facts for the sole purpose of circumventing a decision of the State's highest court which has now been final for years.

B. The Complicated Factual Nature Of This Case Would Not Lend Itself To a Decision Further Clarifying Inverse Condemnation Law.

In Sonoma County Organization Of Public Employees v. County of Sonoma, supra, 23 Cal.3rd 296 the California Supreme Court described the effect of Government Code section 16280 as follows:

On June 6, 1978, an initiative measure was passed by the electorate adding article XIII A to the California Constitution. The provision, designated on the ballot as Proposition 13, placed significant limitations upon the taxing power of local and state government; the amount of revenue which local entities could raise by means of

property taxes was sharply reduced. In order to mitigate the effects of this reduction, the Legislature determined to distribute surplus funds which had been accumulated in the state treasury to local agencies.

By enactment of section 16280 of the Government Code, the Legislature prohibited the distribution of state surplus or loan funds to any local public agency granting to its employees a cost-of-living wage or salary increase for the 1978-1979 fiscal year which exceeded the cost-of-living increase provided for state employees. In addition, the section declares null and void any agreement by a local agency to pay a cost-of-living increase in excess of that granted to state employees.

Id. at 302. Footnotes omitted.

As a result salary increases were withheld from the employees by the local entities. Petition 6.

In traditional inverse condemnation actions, including that in First English Envan. Luth. Ch. v. County of Los Angeles (1987) ____ U.S. ____, 107 S.Ct. 2378, 96 L.Ed. 2d 250, the inverse condemnation is worked by the action of legislation which restrict the use of

privately owned real property. But in the present case, Government Code section 16280 (which is set forth at Petition 15a) the restriction created by the state legislation is imposed, in part, on other public entities, the local entities receiving funds from the state. While that legislation has now been declared violative of the impairment of contract clauses of both the California and Federal Constitutions, no court has held that such invalidation of legislation can constitute inverse condemnation of a contractual right to receive money.

Certainly the factual situation presented in the instant case is so removed from that of First English that a granting of a Petition for Writ of Certiorari based on the decision in First English is wholly unwarranted. First English dealt with a simple and clear case inverse condemnation with the thrust of a

decision being directed toward the issue of whether or not interim damages were to be available to plaintiffs for the period of time between the enactment of invalid legislation and the declaration of its invalidity. First English establishes no new law regarding the elements which caused creation of the inverse condemnation or as to what kinds of property inverse condemnation can be applied. Thus, even though First English does narrow the scope of Agins v. City of Tiburon, supra, 24 Cal.3d 266, a case upon which the Court of Appeal in the present case relied heavily, First English does nothing to establish new law regarding the elements of inverse condemnation.

Respondents' research has revealed no case similar to the present case where it is argued that the placing of restrictions on funds transferred from a State to local entities can serve as the

basis of an inverse condemnation action. In fact respondents are unfamiliar with any other, and petitioners have cited no other, circumstances similar to the present case whether or not they lead to inverse condemnation actions.

This case involves not an important principle of law but rather only one of those little oddities that are, on rare occasions, created by situations such as the enactment of Proposition 13 in California which suddenly, and unexpectedly, placed financial burden on local entities. Sonoma County Organization of Public Employees v. County of Sonoma, supra, 23 Cal.3d 296. Given this factual background which, if not unique, is certainly very unusual, the present case is an inappropriate vehicle for yet another contemporary consideration of inverse condemnation law by this court.

II. THIS ACTION IS NOT RIPE FOR
CONSIDERATION OF ISSUES ATTEMPTED TO
BE RAISED BY PETITIONERS REGARDING
WHETHER OR NOT A COMPENSABLE TAKING
HAS OCCURRED.

The second and third Questions Presented in the Petition both pose premature questions.

No California Court has yet ruled on the issue of whether or not the taking of contractual rights to receive wage increases constitutes a compensable taking within the meaning of the Fifth Amendment. Since no California court has ruled on the existence of a cause of action in inverse condemnation, it is manifest that no California court has ruled on this measure of damages in such an action. Accordingly, it would be premature for this Court to grant Certiorari in relation to the second and

third Questions Presented by petitioners.

III. PETITIONERS HAVE CITED NO CASE IN
POINT IN SUPPORT OF ARGUMENT THAT
INVERSE CONDEMNATION HAS OCCURRED IN
THE PRESENT CASE.

Before this Court should reach the interim damages issue raised in First English, petitioners should be required to make a substantial showing that they had a property right which can properly be subjected to inverse condemnation. None of the cases relied upon by petitioners supports their argument that their contractual right to receive increased wages could be the subject of an inverse condemnation action. Critically, the two principle cases upon which they rely (United States Trust Co. of N.Y. v. New Jersey (1977) 431 U.S.1, 97 S.Ct. 1505, 52 L.Ed.2d 92 and Lynch v. United States

292 U.S. 571, 54 S.Ct. 840, 78 L.Ed. 1434) are not inverse condemnation cases. Respondents accept, as they must in light of Sonoma, that Government Code sections 16280 and 16280.5 did constitute an impairment of contract. But rather than supporting petitioners' position that an inverse condemnation has occurred in the present case, Sonoma, United States Trust Co., and Lynch all support the proposition that when legislation interferes with contractual rights, the remedy is found in the impairment of contract clauses rather than in inverse condemnation.

As stated by the California Court of Appeal, "However, appellants have cited no authority for the proposition that legislation enacted in violation of the state and federal constitutional prohibitions against impairment of contractual obligations give rise to an

action for inverse condemnation." Slip opinion, Petition 11a.

If the measure of damages to be awarded for impairment of contracts is to include interest on the lost use of money, then the proper remedy for employees denied their wage raises was to seek review from this court in the Sonoma case. Not having done so, they must not be allowed to correct that failing by incorrectly converting an impairment of contract case into an inverse condemnation action.

IV. NO IMPORTANT ISSUES OF LAW INVOLVED.

While plaintiff's attempt to utilize an inverse condemnation action does present an interesting question of law, it hardly satisfies the requirements of being the type of important question of law upon which this court should expend

its limited resources. To respondent's knowledge there certainly is no conflict between courts, either federal or state, on this issue since respondents are unaware of any other cases dealing with this issue. Nor have respondent's cited any other cases dealing with this issue. This certainly is not a widespread social issue which is the subject of legislation, comments in law reviews or even newspaper editorials. In point of fact this case involves nothing more than an attempt, by convoluted reasoning, to twist an inapplicable concept of law to fit into a tortured factual pattern so as to avoid the effect of a final judgment in another case which is binding on these petitioners. This court has recently resolved the important issue of the availability of interim damages in a properly brought inverse condemnation action. Neither the facts at issue nor

the manner in which this case was resolved add any luster to petitioner's claim of importance in the present case. The present case grew out of a very unusual factual and legal situation which is highly unlikely to be repeated.

CONCLUSION

For all of the reasons set forth above, the petition for writ of certiorari should be denied.

JOHN K. VAN DE KAMP
Attorney General of the State of
California
MARY MICHEL
Supervising Deputy Attorney
General

Robert E. Murphy

ROBERT E. MURPHY
Deputy Attorney General
350 McAllister Street, Rm. 6000
San Francisco, CA 94102
Telephone: (415) 557-3946

Attorneys for Respondents

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No. 87-557

Supreme Court, U.S.
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CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

FRESNO POLICE OFFICERS
ASSOCIATION, et al.,

Petitioner,

vs.

STATE OF CALIFORNIA, et al.,

Respondents.

REPLY BRIEF OF PETITIONER

CHRISTOPHER D. BURDICK
PHILIP M. MILLER
CARROLL, BURDICK & McDONOUGH
One Ecker Building, Suite 400
Ecker and Stevenson Streets
San Francisco, California 94105
(415) 495-0500

GEORGE W. SHAEFFER, JR.
SILVER, KREISLER, GOLDWASSER
& SHAEFFER
1201 Dove Street, Suite 600
Newport Beach, California 92660
(714) 955-1971

Counsel for Petitioner

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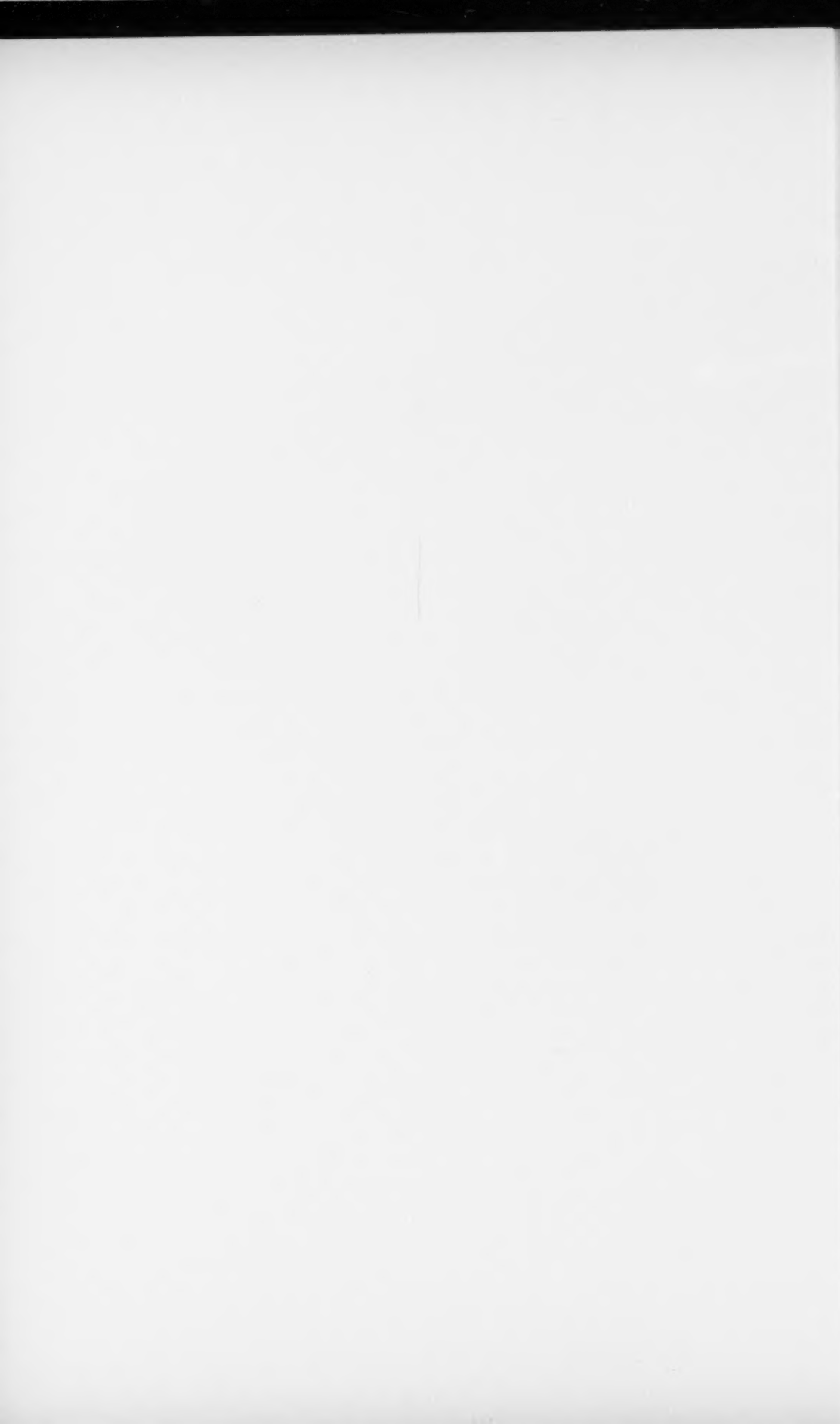


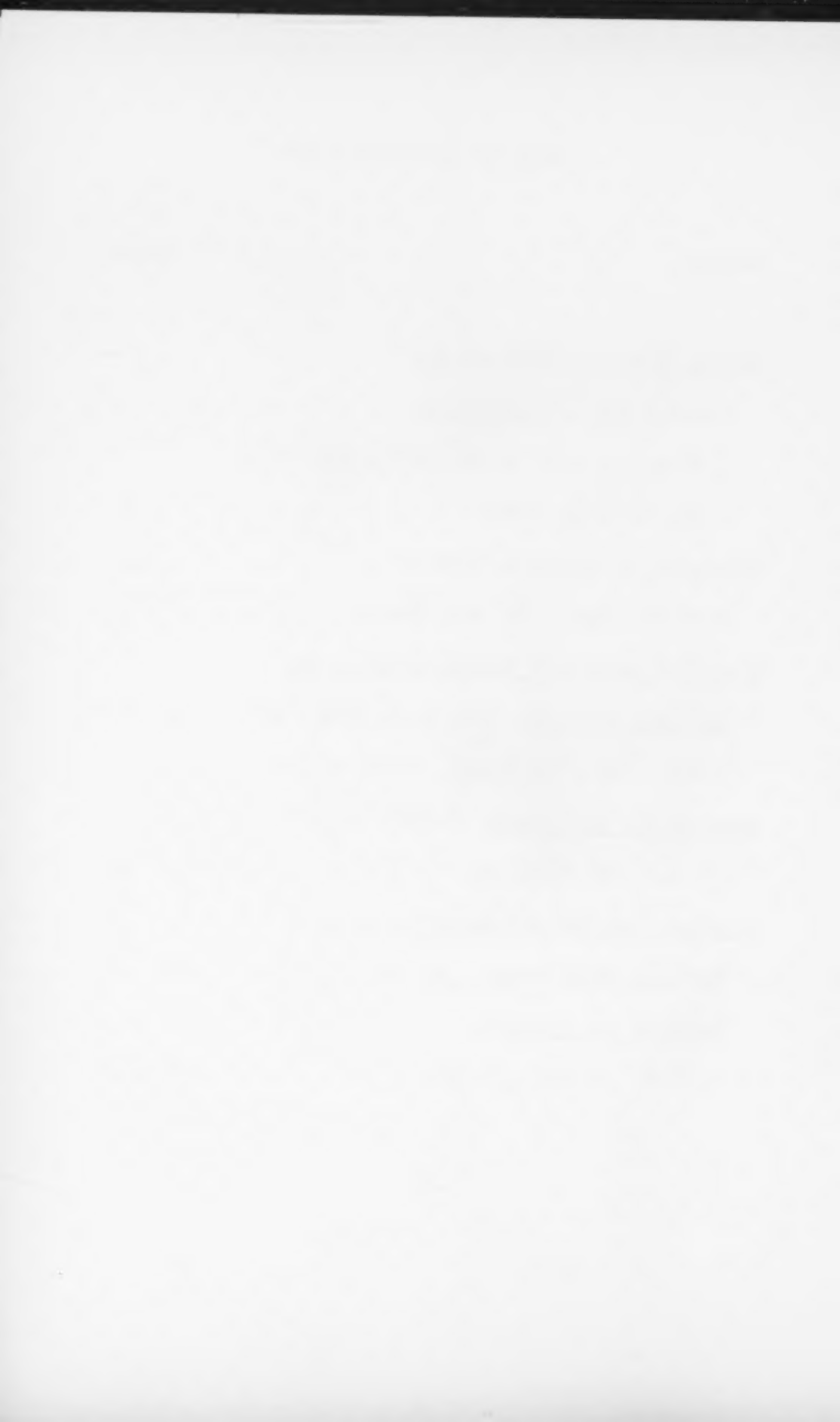
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

FRESNO POLICE OFFICERS ASSOCIATION, et al.,
Petitioner

v.

STATE OF CALIFORNIA, et al., Respondents

REPLY BRIEF OF PETITIONER

Although the reasons which we believe warrant the grant of a writ are adequately stated in the Petition, we believe a brief reply is warranted to correct and to comment on several of the factual assertions and legal contentions in STATE's Brief in Opposition to Certiorari.

1. The Liability of STATE for Interest was not Decided in Sonoma County.

STATE argues that the instant Petition is an attempt to circumvent the

decision of the California Supreme Court in Sonoma County Organization of Public Employees v. County of Sonoma (1979) 23 Cal.3d 296. (Br. in Opp. 10). In making this argument, STATE asserts that the California Supreme Court held in Sonoma County, as a matter of law, that interest was not available. (Br. in Opp. 8).

The liability of the STATE for interest was not at issue and not resolved in Sonoma County. The California Supreme Court held that interest was not recoverable against the local public agency employers; the California Supreme Court did not hold that public employees were barred from recovering interest from the STATE. Id. at 321.

Sonoma County involved actions between various public employee organizations and their public agency



employers. The STATE was identified as a real party in interest by the Court. Id. at 303.

The employee organizations requested interest on the wages withheld from their local public agency employers as a result of the holding by the Court that Government Code §16280 and 16280.5 constituted an unconstitutional impairment of contract and a violation of the home rule provisions of the California Constitution. Sonoma County held only that the local public agency employers were not required to pay prejudgment interest. In so holding, the Court in Sonoma County stated as follows:

"Petitioners also seek interest from July 1, 1978, on the wages withheld. Prejudgment interest is not allowed if the debtor 'is prevented by law... from paying the

debt.' (Civ. Code, §3287.) As the local entity respondents make abundantly clear, the practical effect of Section 16280 and 16280.5 was to prevent them from paying the increases called for in the contracts, ...

"Let a peremptory Writ of Mandate issue directing respondent local entities to pay to their officers and employees the salary increases provided in the 1978-79 agreements..." Id. at 321.

Therefore, contrary to the assertion of STATE, Sonoma County did not hold as a matter of law that interest was not recoverable from the STATE.

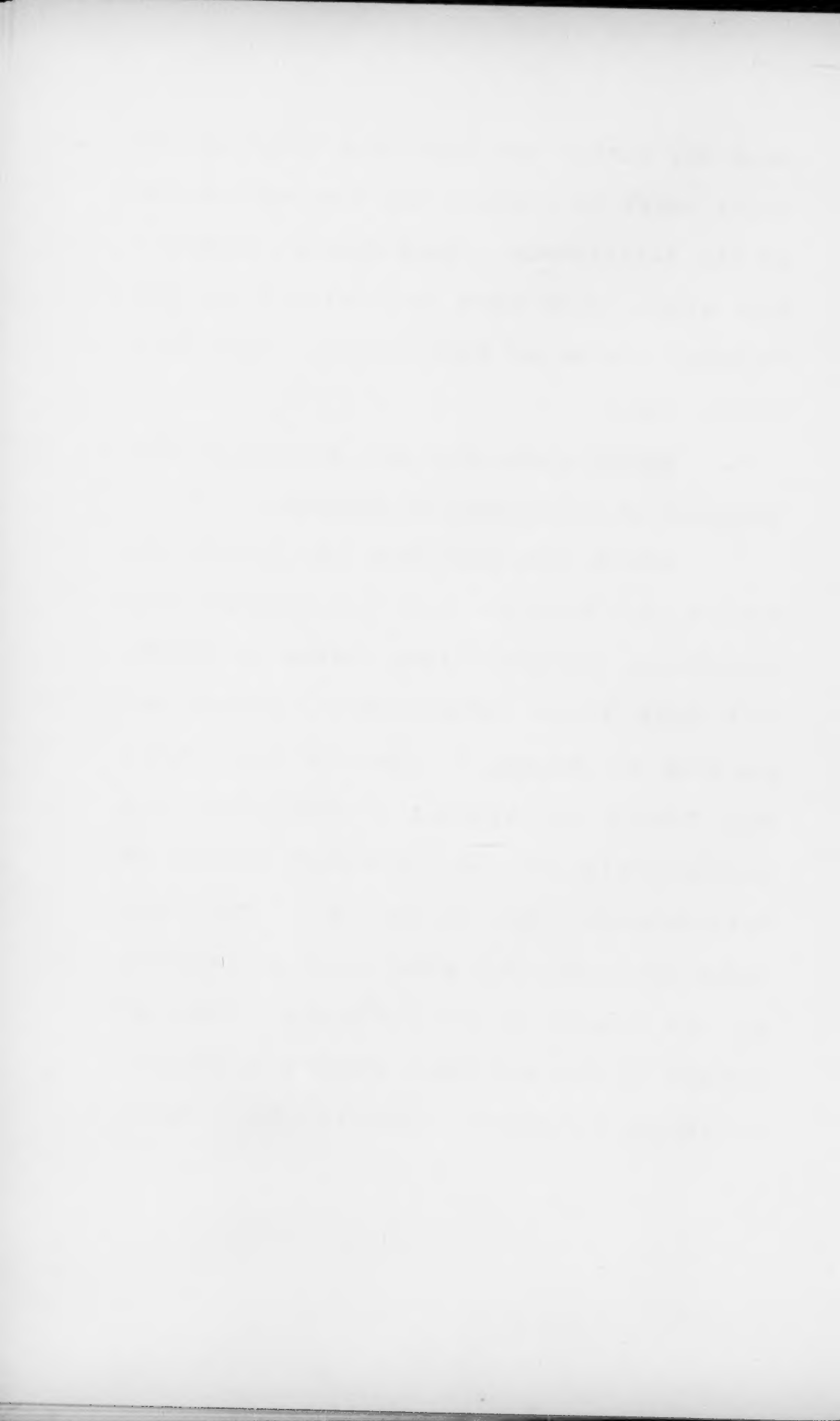
Furthermore, had the STATE's liability for interest been resolved in Sonoma County, there would have been no



need for either the Appellate Court or the trial court to resolve the "taking" claims of the Petitioners. Both Courts, however, did solve this case exclusively on the "taking" claims of Petitioners. (See Pet. 14-17, 12a.)

2. Petitioners are not Barred by the Doctrine of Collateral of Estoppel.

STATE concedes that the California Court of Appeal did not reach the collateral estoppel issue raised by STATE, and that these Petitioners "[w]ere not parties to Sonoma." (Br. in Opp. 8,9.) The Court of Appeal's decision was exclusively on the "taking" claims of Petitioners. (Br. in Opp. 9.) The trial judge (Pollack, J.) also ruled exclusively on the basis of Petitioners' "taking" claims; it did not reach STATE's collateral estoppel argument. (App.14-15). Thus,



whether the Petitioners are barred by the doctrine of collateral estoppel is not properly before this Court.¹

Further, had either the trial court or the appellate court believed Petitioners were barred from bringing an inverse condemnation action as a result of the doctrine of collateral estoppel, the lower courts would have so held. They would not have decided this case exclusively on the constitutional "taking" claims of Petitioners. California courts follow the recognized principle of jurisprudence in deciding cases, if possible, without resolving the constitutional questions raised. People v. Williams (1976) 16

¹ Petitioners contend that they are not barred by the doctrine of collateral estoppel. Petitioners were neither parties nor in privity with the parties in the Sonoma County litigation.

Cal.3d 663, 667; Johnson v. Alexis (1983)
143 Cal.App. 3d 82, 84-85.

3. The Factual Situation of this Case
Does Not Justify Denial of the Writ.

The facts in this matter are not complicated. STATE took Petitioners' contractual rights to receive salary increases by the adoption of Government Code §§16280 and 16280.5.

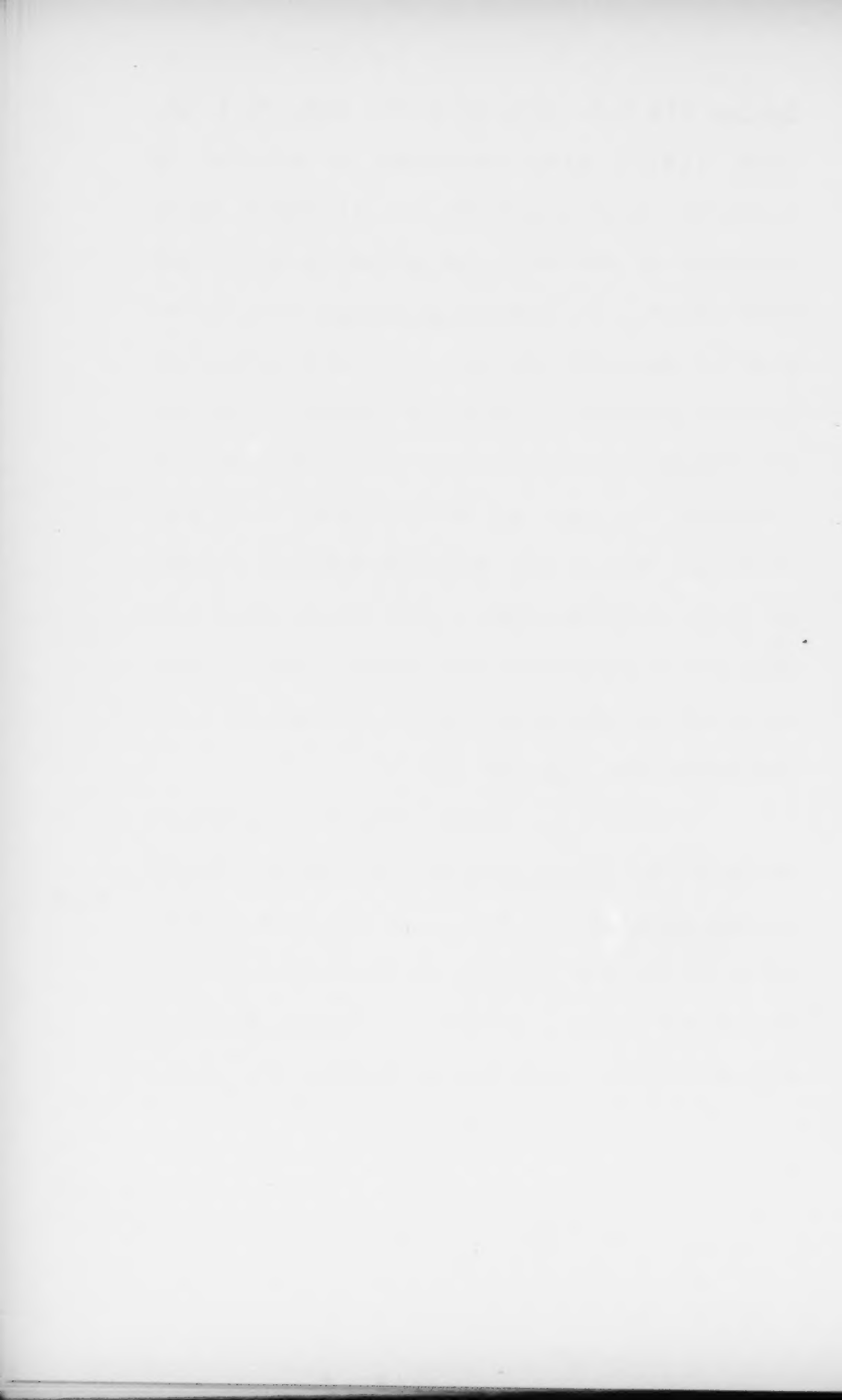
Petitioners concede there is no case precisely on point. However, the application of analogous cases decided by this Court amply support the granting of the Writ.

This Court has consistently recognized contractual rights as being property protected by the taking clause of the Fifth Amendment. (Pet. 27-30). As discussed in the Petition (Pet. 31-34), Liggett & Myers Tobacco Company v. United



States 274 U.S. 215, 47 S.Ct. 581, 71 L.Ed. 1006 (1927) also involved an action in inverse condemnation to recover only interest on the value of property which had been taken. In Liggett & Myers, the United States agreed to pay for the value of Tobacco products "taken" pursuant to an act of Congress; however, the Government refused to pay an additional sum for interest which the Tobacco Company sought as just compensation. The Court held the Company's property was taken, and it was entitled to the interest it claimed as just compensation. Id. at 220.

Finally, this Court's recent decision in First English Church v. County of Los Angeles ___U.S.____, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987) is discussed in the Petition (Pet. 34-39). First English establishes that Petitioners, or those



similarly situated, are not limited exclusively to a mandamus action to set aside Government Code §§16280 and 16280.5.

It should be noted that STATE's declaration of a fiscal emergency justifying the adoption of Government Code §§16280 and 16280.5 was a report prepared by the legislative analyst. The Court in Sonoma County specifically held that the burden of establishing such a fiscal emergency was not met. The Court in Sonoma County concluded that: "Thus, the asserted 'fiscal emergency' relied upon by respondents as justification for the salary limitation was largely alleviated by the very same bill which contains the limitation." Id. at 311.

4. All Issues Presented in the Petition are Ripe for Review.

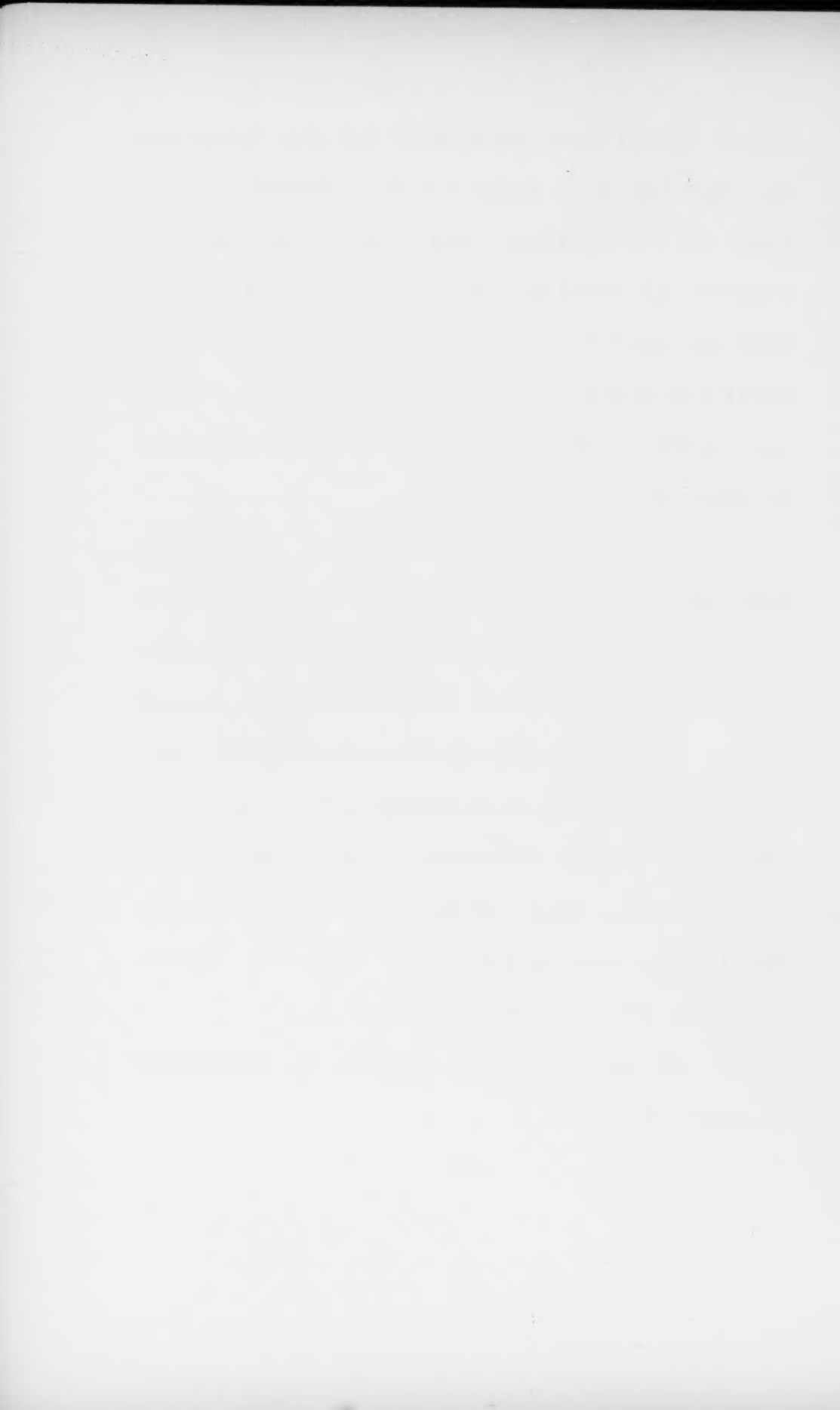
STATE argues that the second and



third questions presented in the Petition for Review are premature. STATE argues that no California Court has ruled on the issues of whether a cause of action in inverse condemnation lies for the taking of contractual rights to receive wage increases or the measure of damages. (Br. in Opp. 15).

The trial court held that the enactment of the statutes at issue was not a taking of private property within the meaning of the taking clauses of the United States and California Constitutions, and granted judgment in respondents favor. The Court of Appeal affirmed. (Pet. 8a, 13a). Therefore, the STATE's assertion is incorrect; all issues presented for review are ripe for consideration.

5. An Important Question is Presented in this Petition.



STATE argues the issues presented in this Petition resulted from a "little oddity" unlikely of repetition. (Br. in Opp. 14-20.) Petitioner's are not as sanguine that future attempts to "take" contracted for salary increases will not occur in California, other states, or as a result of congressional action.

Considerable commentary exists on the fiscal problems facing public entities throughout the nation, and the concomitant efforts to limit taxes, expenditures, and revenues of public entities. See, e.g., Befort, Public Sector Bargaining: Fiscal Crisis and Unilateral Change, 69 Minn. L.Rev. 1221, (1985); Griffith, The Federal Guarantee of Municipal Debt: Will Federalism Survive, 19 The Urban Lawyer 583 (1987); Moore, Undoing the Second American Revolution: Moore, An English View of Tax,

Expenditure and Revenue Limitations in the United States and the United Kingdom, 19 The Urban Lawyer 105 (1987); Allshouse, The Role of the Appropriations Process in Public Sector Bargaining, 17 The Urban Lawyer 165 (1985).

Employee wages and benefits comprise more than sixty percent of the budgets of most public sector employers. Befort, supra, at 1223 n. 6. Befort argues:

"The adoption of taxpayer-initiated referenda limiting property tax revenues in California (Proposition. 13) [Citation] and Massachusetts [Citation], were the best-publicized examples of a nationwide phenomenon that made it 'good politics' to oppose union demands.



[Citation]" Befort, supra,
at 1222 n. 5.

Subsequent attempts are therefore possible to limit salary increases of public employees by taking them under the guise of fiscal emergencies.

Congress has had the occasion to "bail-out" local public entities by guaranteeing a municipality's debt. See, Griffeth, supra, at 590 n. 17 & 18, which identifies the following examples: New York City Loan Guarantee Act of 1978, Pub. L. No. 95-339, 92 Stat. 460; Emergency Loan Guarantee Act (1971), 15 U.S.C. §§1841-1851; National Urban Policy and New Community Development Act of 1970, 42 U.S.C. §§4501-4527; and Rural Electrification Act of 1936, 7 U.S.C. §§901-950b.

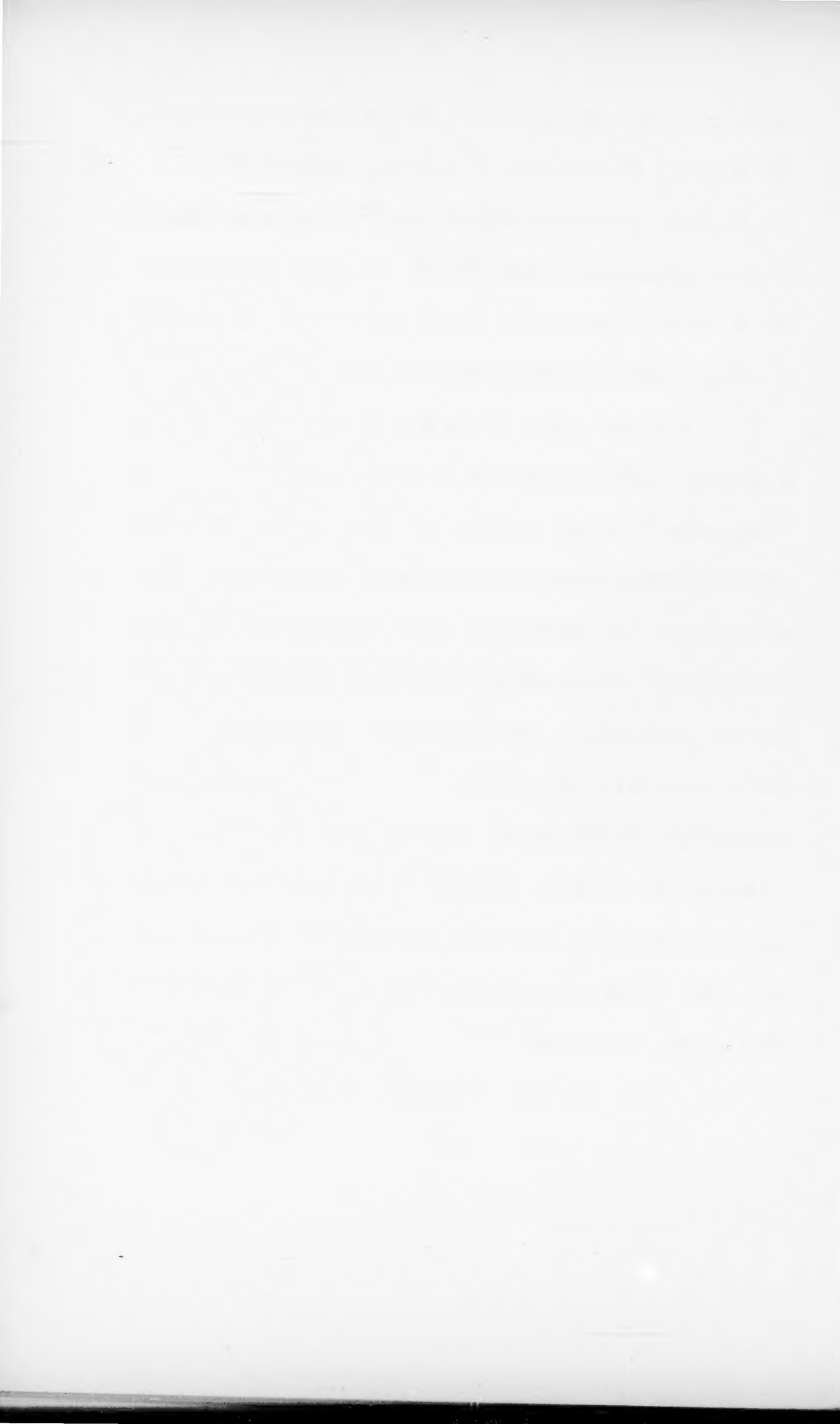
Employees of the United States Government do not negotiate their wages



through the collective bargaining process, (5 U.S.C. §7103(12) & (14)). Nevertheless, it is not inconceivable that Congress could place similar conditions on the guarantee of a municipality's debt as California did in Government Code §§16280 and 16280.5.

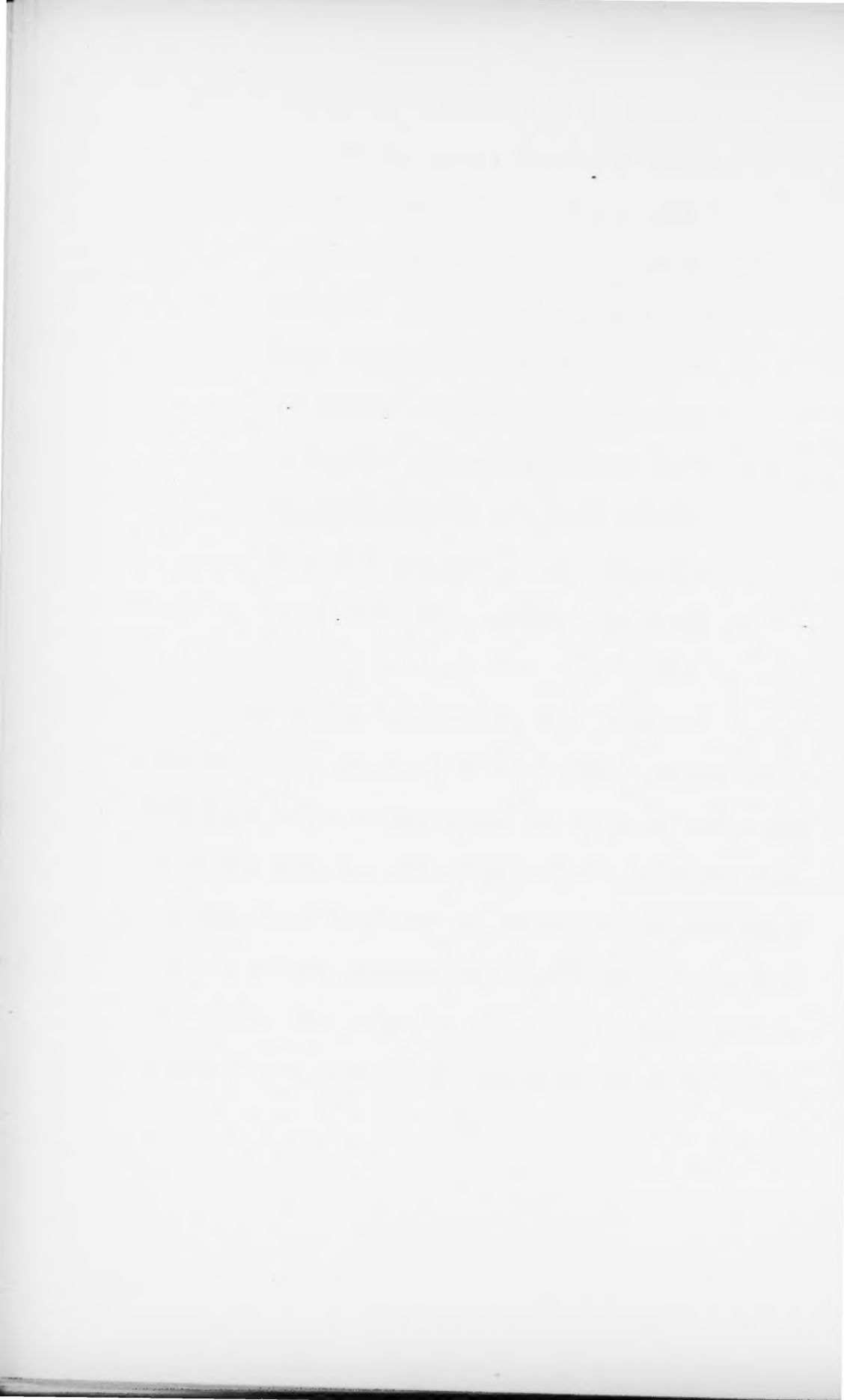
Given the fiscal limitations of cities, it appears more likely future "takings" will occur of public employee contractual rights to salary increases than a repeat of some of the examples of the "takings" reflected in the decisions of this Court. Moreover, whether the Petitioners herein, or those similarly situated throughout the United States, are likely to suffer future "takings" of their contracted for salary increases should not be the determining factor. As this Court has long observed:

"It is axiomatic that the



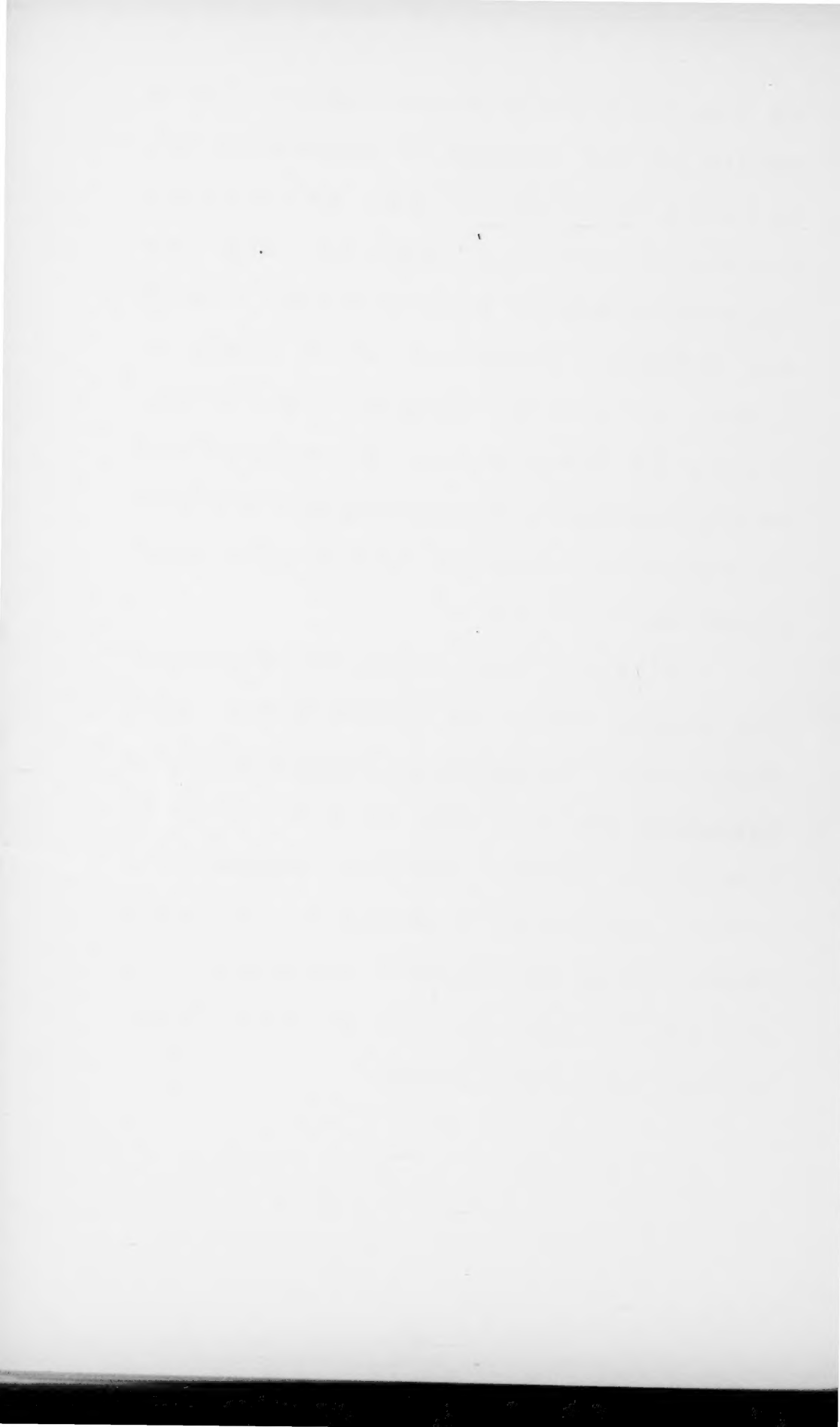
Fifth Amendment's just compensation provision is 'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' [Citation]." First English Church v. County of Los Angeles, supra, 107 S.Ct. at 2388.

Absent the issuance of a writ by this Court, Petitioners will be required to bear the burden of Government Code §§16280 and 16280.5. Proposition 13 was adopted pursuant to Articles 2, Section 8(a) and 4, Section 1 of the California Constitution which reserve to the people the power of initiative to propose and adopt amendments



to the California Constitution. As a result of the passage of Proposition 13, Article XIII A of the California Constitution was adopted, and the legislature enacted Government Code §§16280 and 16280.5. Therefore, STATE should be liable in inverse condemnation for the taking of Petitioners' contracted for salary increases, measured by the interest on the sums withheld from Petitioners' paychecks.

Finally, this Court has discussed the unique nature of public sector labor relations. In Abood v. Detroit Board of Education 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977), the Court emphasized a public employer's decision in labor negotiations is "[a]bove all a political process." Id. at 228, 97 S.Ct. 1796. Further, this Court stated:



"[T]he ease of negotiating a final agreement with the Union may be severally limited by statutory restrictions, by the need for the approval of a higher executive authority or a legislative body, or by the commitment of budgetary decisions of critical importance to others." Id.

In light of the difficult process public employees must undergo to achieve a collective bargaining agreement, Government should not be permitted to take their contracted for salary increases without paying just compensation.

CONCLUSION

For the foregoing reasons and for



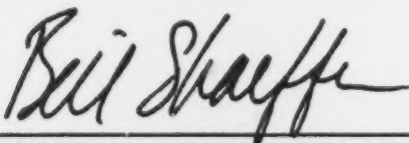
the reasons set forth in the Petition, it is respectfully submitted that the Petition should be granted.

DATED: November 23, 1987
Newport Beach, CA

Respectfully submitted,

CARROLL, BURDICK & McDONOUGH
CHRISTOPHER D. BURDICK
PHILIP M. MILLER

SILVER, KREISLER, GOLDWASSER
& SHAEFFER
A Professional Law Corporation
GEORGE W. SHAEFFER, JR.

By 
GEORGE W. SHAEFFER, JR.
Attorneys for Petitioners



APPENDIX



California Constitution, Article 2, §8(a):

The initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them.

California Constitution, Article 4, §1:

The legislative power of this State is vested in the California Legislature which consists of the Senate and Assembly, but the people reserve to themselves the powers of initiative and referendum.